No. 14-280

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

JOINT APPENDIX

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Petition For Certiorari Filed Sep. 5, 2014
Certiorari Granted Mar. 23, 2015

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Relevant Docket Entries from the Louisiana 19th Judicial District Court, No. 48-489

Case Title: STATE OF LOUISIANA

VS.

HENRY MONTGOMERY

Date Filed	Docket Text
06/28/1963	HENRY MONTGOMERY indicted by 19th Judicial District Court Grand Jury for the murder of Charles Hurt. (Criminal Case No. 48-489).
11/18/1963	INDICTMENT filed by 19th Judicial District Court Grand Jury.
02/04/1964	HENRY MONTGOMERY tried by jury and found guilty as charged for one count of murder.
10/30/1964	DEFENSE Motion for New Trial and Motion for Arrest of Judgment Denied; HENRY MONTGOMERY sentenced.
01/09/1969	HENRY MONTGOMERY granted New Trial, set for February 6, 1969.
02/08/1969	HENRY MONTGOMERY tried by jury and found guilty as charged for one count of murder.
03/19/1969	HENRY MONTGOMERY sentenced to life imprisonment without capital punishment. Counsel for Mr. Montgomery filed notice of appeal.

05/17/2001	ORDER – Application for Post-Conviction Relief denied by Louisiana Supreme Court.
07/13/2012	MOTION TO CORRECT ILLEGAL SENTENCE PURSUANT TO RECENT U.S. SUPREME COURT RULING IN *MILLER V. ALABAMA* ALSO INCLUDED IS A MOTION FOR HEARING AND ATTACHED EXHIBITS, filed by Henry Montgomery.
07/26/2012	MOTION TO CORRECT ILLEGAL SENTENCE PURSUANT TO RECENT U.S. SUPREME COURT RULING IN *MILLER V. ALABAMA* ALSO INCLUDED IS A MOTION FOR HEARING AND ATTACHED EXHIBITS, Received and filed into record by Clerk of Court.
12/13/2012	RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL filed by the State of Louisiana.
01/03/2013	TRAVERSE TO RESPONDENT'S ANSWER FOR MOTION TO CORRECT ILLEGAL SENTENCE AS UNCONSTITUTIONAL filed by Henry Montgomery.
01/04/2013	MOTION WITH INCORPORATED MEMORANDUM TO CONTINUE MOTION HEARING – filed by Henry Montgomery.
01/08/2013	SUPPLEMENTAL RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL filed by the State of Louisiana.

01/22/2013	MEMORANDUM ON BEHALF OF DEFENDANT IN OPPOSITION TO STATE'S RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL – filed by Henry Montgomery.
02/05/2013	ORDER – Denying Motion to Correct Illegal Sentence Pursuant to Recent U.S. Supreme Court Ruling in *Miller v. Alabama* – Denied by Judge Richard Anderson, 19th Judicial District Court.
02/22/2013	MOTION AND NOTICE OF WRIT APPLICATION – filed by counsel for Henry Montgomery.
05/20/2013	WRIT APPLICATION TRANSFERRED to the Louisiana Supreme Court, by the First Circuit Court of Appeal for the State of Louisiana, which has "exclusive supervisory jurisdiction of all criminal writ applications relating to convictions and sentences imposed prior to July 1, 1982." La Const. art. V, 5(E). *2013 KW 0442.*
06/20/2014	WRIT DENIED by the Louisiana Supreme Court, holding the District Court did not err in denying relator's Motion to Correct an Illegal Sentence. See *State v. Tate*, 12-2763 (La. 11/5/13), 130 S.Ct. 829, cert. denied, *Tate v. Louisiana,* No. 13-8915 (May 27, 2014). *2013-KP-1163.*

09/05/2014	PETITION FOR WRIT OF CERTIORARI filed with Supreme Court of the United States. No. 14-280.
03/25/2015	PETITION FOR WRIT OF CERTIORARI GRANTED

Relevant Docket Entries from the Louisiana First Circuit Court of Appeal, No. 2013-KW-0442

Case Title:	STATE OF LOUISIANA
	VS.
	HENRY MONTGOMERY
Date Filed:	03/20/2013
Postmark Date:	03/20/2013
Received Date:	03/22/2013
Appeal/Writ Type:	KW – Criminal Writ
Date Filed	Docket Text
4/3/2013	Brief Received
4/17/2013	Supplement
5/20/2013	Notice of Judgment and Disposition
5/20/2013	Decision on Writ Application
5/21/2013	Supreme Court Notice of Writ

Relevant Docket Entries from the Louisiana Supreme Court, No. 2013-KP-1163

Case Title: STATE OF LOUISIANA

VS.

HENRY MONTGOMERY

Date Filed: 5/21/2013

Filing was: Postal Meter on 5/20/2013

Application Made by: Defendant

Applying for: Supervisory and/or Remedial Writs

Remark:

Applicant's Name: Montgomery, Henry

Parties: State of Louisiana Plaintiff
Alge, Dylan Christopher, Esq.
Clark, Colin Andrew, Esq.
Moore, Hon. Hillar Clement, III

Montgomery, Henry Defendant
Collins, Sean Michael, Esq.
Mitchell, Michael Anthony, Esq.
Plaisance, Mark David, Esq.

WRIT ACTION INFORMATION

06/20/14 WRIT ACTION

Remarks: Denied. The district court did not err in denying relator's Motion to Correct an Illegal Sentence. See State v. Tate, 12-2763 (La. 11/5/13), 130 So.3d 829,

cert. denied, Tate v. Louisiana, No. 13-8915 (May 27, 2014).

06/20/14 WRIT DENIED

BJJ	Action – Against	N.R. # 32
	Remarks: dissents and would grant the writ and assigns reasons.	
JPV	Action – For	N.R. # 32
JTK Author	Action – For	N.R. # 32
JLW	Action – For	N.R. # 32
GGG	Action – For	N.R. # 32
MRC	Action – For	N.R. # 32
JDH	Action – For	N.R. # 32

Remarks: Denied. The district court did not err in denying relator's Motion to Correct an Illegal Sentence. See State v. Tate, 12-2763 (La. 11/5/13), 130 So.3d 829, cert. denied, Tate v. Louisiana, No. 13-8915 (May 27, 2014).

IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

CRIMINAL CASE NO.: **48-489**

HENRY MONTGOMERY (MOVANT)

VERSUS

STATE OF LOUISIANA, ET AL (RESPONDENT)

(July 13, 2012)

****

MOTION TO CORRECT AN ILLEGAL SENTENCE PURSUANT TO RECENT U.S. SUPREME COURT RULING IN MILLER V. ALABAMA. ALSO INCLUDED IS A MOTION FOR HEARING AND ATTACHED EXHIBITS

****

SUBMITTED BY:
HENRY MONTGOMERY
071240
LOUISIANA STATE
PENITENTIARY
ANGOLA, LA. 70712

CRIMINAL MATTER:

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[i] IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY (MOVANT)	* *	CASE NO. 48-489
VERSUS	* *	SECTION _____
STATE OF LOUISIANA (RESPONDENT)	* *	FILED: _____

****

MOTION FOR HEARING

NOW INTO COURT, in proper person, Comes, Henry Montgomery, hereinafter referred to as movant in the above captioned case, who, respectfully

urges the court to grant a hearing in relation to a Motion To Correct Illegal Sentence and to support his cause, the movant presents the following:

-a-

Movant avers, that he has submitted a motion to correct illegal sentence into the district court, in lieu of the U.S. Supreme Court's recent ruling in **Miller v. Alabama.**

-b-

Movant further aver, that a hearing is essential to his cause. For, the movant seeks to have his sentence vacated and he be resentenced to a legal sentence in order to be in compliance with the U.S. Supreme Court's decision. Thus, in order to accomplish this objective, the movant will need to produce live witnesses and live arguments.

CONCLUSION

Wherefore, the movant pray, that he be afforded a hearing and that he be afforded ample time to prepare for said hearing.

/s/ Henry Montgomery

[1] IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY [MOVANT]	* *	CASE NO. 48-489
VERSUS	* *	SECTION: _____
STATE OF LOUISIANA [RESPONDENT]	* *	FILED: _____

****

MOTION TO CORRECT ILLEGAL SENTENCE

NOW INTO THE COURT, in proper person, Comes, Henry Montgomery, a state prisoner, in pro se capacity, who, pursuant to La.C.Cr.P. Art. 822 Art. 872 and Art. 882, urges the court to correct said illegal sentence, and to support his cause, the following is presented:

STATEMENT OF JURISDICTION

Movant contends, that this Court has inherent jurisdiction to adjudicate the merits of the case sub judice pursuant to La.C.Cr.P. Art. (17).

RELEVANT PROCEDURAL HISTORY OF THE CASE

According to court records, On June 28, 1963, an East Baton Rouge Grand Jury charged Henry Montgomery (Movant) with the murder of Charles H. Hurt.

See:(Attached Exhibit-Indictment). On February 4, 1964, after trial by jury, the movant was convicted as charged. On March 19, 1969, the trial court proceeded to sentence the movant to a mandatory life sentence. *See: (Attached Exhibit-Minutes).*

[2] BASIS FOR CORRECTION OF AN ILLEGAL SENTENCE

According to statutory, as well as case law, "An illegal sentence may be corrected at any time". La.C.Cr.P Art. 882. Customarily, this motion may be filed by the defendant. ***State ex rel. Fouche v. C.D.C.***, 93-1001- (La.9-2-94), 642 So.2d 1274. Furthermore, the movant avers, that the basis for a valid sentence are situated under the statutory provision of La.C.Cr.P. Art. 872, which mandate in pertinent part: "A valid sentence must rest upon a valid. Indictment, verdict and plea of guilty"

Recently, the U.S. Supreme Court has determined that a mandatory life sentence is unconstitutional, in respect to a person, who, was (17) years of age or younger during the commission of the crime. *Miller v. Alabama*, ___ S.Ct. ___, 2012 WL-2368659 (Decided June 25, 2012). Movant avers, that during the commission of the case at hand, he was at the tender age of (17). Thus, after serving (49) grueling years of toiling and struggling, the movant, pursuant to the U.S. Supreme Court's reasoning as announced in **Miller**, seeks to have his illegal sentence corrected.

MEMORANDUM OF LAW
IN SUPPORT FOR CAUSE

The U.S. Constitution 8th Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions". ***Roper v. Simmons***, 543 U.S. 551 (2005), ___ S.Ct. ___. During the era of 1963, the state of Louisiana had several statutory offenses punishable by a mandatory life sentence. LSA-R.S.14:30 (*First degree murder*); R.S.14:42 (*Aggravated Rape*); R.S. 14:44 (*Aggravated Kidnapping*), and R.S. 40:966 (*Distribution of Heroin*). Over the years and to date, there have been various changes to the sentencing provisions in the above mentioned offense(s).

For, instance, first degree murder has always carried two punishments, death or mandatory life imprisonment. *See:* (*R.S. 14:30(B)*. However, the U.S. Supreme Court determined that the capital punishment of a convicted defendant for the offense – aggravated rape violated the U.S. Constitutional 8th Amendment excessive punishment clause. ***Kennedy v. Louisiana***, 554 U.S. 419, ___ S.Ct. ___ (2008). Subsequent to the ruling in Kennedy, the state of Louisiana responded by automatically removing such individuals from death row. Also, each defendant was re-sentence to a sentence of life imprisonment.

[3] Now, in regards to R.S. 40:966(B)(1) – Distribution of Heroin, in the year 2001, the state legislators enacted a law abolishing the mandatory life sentence without benefit of probation or suspension of

sentence. Although R.S. 40:966(B) – distribution of heroin never prohibited parole, the new law completely remodeled the sentencing provision of said statue [sic]. For, the new sentencing provision Act No. 403 of 2001 Regular Session amended the mandatory life sentence to carry from (5) to (50) years, with benefit of parole, probation or suspension of sentence.

In regards to R.S. 14:42 aggravated rape and R.S. 14:44 aggravated kidnapping and the mandatory life sentence, without benefit of parole, probation or suspension of sentence, the U.S. Supreme Court has recently held that a life sentence without parole, for a person who committed a non-homicide crime as a juvenile is unconstitutionally excessive. ***Graham v. Florida***, 560 U.S. ___, ___ S.Ct. ___ (2010). Therefore, the U.S. Supreme Court's ruling in **Graham** will call for immediate relief to any offender in the state of Louisiana, who has a mandatory life sentence without parole and was (17) years old or younger during the commission of the crime.

Now, we come to the relevant part of the instant litigation. The movant, Henry Montgomery, was convicted for murder and he received a mandatory life sentence, without benefit of parole, probation or suspension of sentence. Recently the U.S. Supreme Court has determined, that a person convicted as a juvenile and sentenced to a life sentence without parole has received an unconstitutional sentence. ***Miller v. Alabama***, ___ S.Ct. ___, 2012 WL-2368659 (Decided June 25, 2012). The Court, in making its decision announced some sensitive facts in reaching it's conclusion.

Thus, the Court held: "But the mandatory penalty schemes at issue here prevents the sentence from taking account of these central considerations. By removing youth from the balance – by subjecting a juvenile to the same life-without parole sentence applicable to an adult these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes Graham's and Roper's foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children". **Miller, supra**.

[4] EXCESSIVE SENTENCE

The U.S. Constitution 8th Amendment and La. Constitution of 1974, Article I Section (20) both prohibits the pronouncement of an excessive sentence, in which amounts to cruel and unusual punishment. In our state of Louisiana, courts have traditionally addressed this matter in a very civil manner. One such court in our state of Louisiana has exhibited candor and common sense in identifying the ills of excessive punishment. The Louisiana Third Circuit Court of Appeal in the case ***State v. Bailey***, 968 So.2d 247 at 250 (La.App. 3 Cir. 10/3/07), addressed the standard of excessiveness of sentence in the following manner:

> "A sentence which falls within the statutory limits may be excessive under certain circumstances. To constitute an excessive sentence,

> this Court must find that the penalty is so grossly disproportionate to the severity of the crime as to shock our sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. The trial judge has broad discretion, and a reviewing court may not set sentences aside absent a manifest abuse of discretion".

In using the above factors in evaluating the instant case for an excessive sentence determination, it is wise to consider the language found in *Miller v. Alabama*, The Court has stated: "We therefore hold that the Eight [sic] Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation". citing, ***Graham***.

According to the statutory provision of LSA-R.S. 15:574.4(B) provides that "No prisoner serving a life sentence shall be eligible for parole consideration until that sentence has been commuted to a fixed number of years" ***Bosworth v. Whitely***, no. 93-CA-1829, 627 So.2d 629 (La.1993). Considering the aforementioned language in 15:574.4(B) and the U.S. Supreme Court's ruling in **Miller v. Alabama**, it is virtually impossible for the movant to be re-sentenced to parole eligibility, while currently serving a life sentence. Thus, statutory law confirms the aforementioned

assertion. For, the La.C.Cr.P. Art.879 provides that "If a defendant who has been convicted of an offense is sentenced to imprisonment, the court **shall** impose a determinate sentence". A sentence is considered grossly disproportionate if when the crime and punishment [5] are viewed in light of the harm done to society, it shocks the sense of justice" ***State v. Hogan***, 480 So.2d 288 (La. 1985).

AUTOBIOGRAPHY OF HENRY MONTGOMERY:

The movant, Henry Montgomery, was born on June 17, 1946 in the city of East Baton Rouge. He was the oldest of six children. His family structure consisted of his mother and father, plus three sisters and three brothers. Henry was assigned numerous chores around the house, to which he faithfully fulfilled. His father worked at an area Aluminum Plant and his mother worked as a seamstress. With both parents working, Henry had idle time to himself.

During the year 1963, the movant was in the 11th grade at the Scotlandville Senior High School. Henry's school was a segregated school of African-Americans in class together. In fact, the entire environment where Henry grew up was segregated. For, Whites and Blacks lived, worked and fraternize in separate social environments. However, Henry's generation seen vast changes in the day to day life in the East Baton Rouge area. Blacks begin to evolve from the shadows of Jim Crow laws, separation, disrespect, and unequal treatment by the majority White establishment. For,

boycotts were organized by local black leaders, such as the Rev. T.J. Jensen, who's, strong stance against the order of the day, gave new hope to many down trodden blacks. The African-American community in the East Baton Rouge area was awakening to a new sense of pride. For many years the American Dream was excluded from the African-American community. Even though, Blacks were allowed to take up arms in every war of our great nation and pay taxes, they were still being denied the basic rights as other non-Black American citizens enjoyed so freely. For racial disparity had touched every facet of life for the black family. Even though the U.S. Constitution 14th Amendment called for the equal protection and due process for every citizen in the United States, blacks in Henry Montgomery's community never experienced such luxury. Moreover, during the era of 1963, the civil rights struggle was in full swing. Also, during said era the black community grew impatient with its local law enforcement and city municipals officials. As blacks struggled to firmly establish themselves throughout the Nation and Baton Rouge, Louisiana, there were momentums gain but also tragic setbacks. In April 1968 America lost its most prominent drum-major for justice. For, the Dr. Martin Luther King, Jr. was gunned down by an alleged white gunman. Even though the fight for justice was as brilliant as a classic chess mate, the winds of change were blowing hard against the backs of the old way of [6] doing things. Thus, rapid change started to emerge when a revised energetic force of blacks, whites and others pushed hard against the establishment.

However, young Henry Montgomery, never experienced the changes as a free man. For his life was a constant battle of survival from the day to day turmoil of life in Angola.

Movant avers, that the incident in question, which led to the death of Officer Charles H. Hurt was a sad an [sic] unfortunate incident. For, Mr. Hurt was hired to protect the citizens of East Baton Rouge. His death was definitely painstaking on his family. Also, Mr. Hurt's death took its toll on other law enforcement agents and the black community as well. For, the resentment from both sides widened. But for the most part, the movant viewed Mr. Hurt's death as a tragic and regrettable incident that should've [sic] occurred.

HENRY MONTGOMERY'S PRISON JOURNEY

After being found guilty by an all white jury and sentenced to mandatory life imprisonment, Henry Montgomery found himself in a strange world. It was the year (1966) when the movant arrived at the infamous Louisiana State Penitentiary (Angola). During this period Angola was the crowned the most bloodiest prison in America. The prison maintained this title for years. During his early stay, the movant underwent the normal process of trying to survive the treacherous conditions at Angola. Therefore, the movant's conduct record was initially shaky. *See: [Attached Disciplinary Record]*. Henry Montgomery had been transformed from a youth growing up in the

city of Baton Rouge to inmate no. 071240. Thus, living in sub-human conditions causes one to conform to his environment or get sucked up and blown away. Henry Mongtomery [sic] chose to survive and survive he did for (50) years. As prison conditions changed, so did the movant's mind-set. As years went by, the movant began to improve his attitude on life in general. Also, the movaat became socially active in prison programs. The movant helped establish Angola's prominent boxing team. As one of its premiere fighters and one time champ, the movant later became a coach and trainer of the boxing team. The boxing skills taught by the movant to young offenders helped occupied their time and kept them from prison pitfalls. Also, these skills prevented a many young offenders from becoming victims of prison's rapes; which occurred all too often during movant's early days at Angola. Currently, the movant works in the prison Silkscreen Department, where for years, he has impacted the lives of the many inmates here in a positive way. For, had it not been for the advice and counseling of Mr. Henry Montgomery, a [7] many inmates at Angola would have gone in the wrong direction. This writer avers, that he has personally benefited from the fatherly advice of Mr. Henry Montgomery.

MITIGATING FACTORS IN RESENTENCING:

As previously mentioned in the instant motion, the U.S. Supreme Court has determined, that a person such as the movant, who, was convicted as a

juvenile and sentenced to life has endured an illegal sentence. ***Miller v. Alabama***. Therefore the law requires that the movant be resentenced.

For the Court's convenience, the movant would like to point the court to a similar situation as the case at hand. For, in the year 2006, the Louisiana Supreme Court Chief Justice-Calogero wrote an interesting opinion in regards to an (18) year old receiving a life sentence. The Chief Justice's opinion is noted in pertinent part as follows: *"I would grant the writ application and order a new sentencing for this eighteen-year old first offender facing a sentence of life imprisonment. Although the district court was under the impression that it could not depart under any circumstances from the term of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence specified by La.Rev.Stat. 14:42 for the offense of aggravated rape,* ***a court may depart from mandatory penalties provided by the Legislature for an offense upon a showing by the defendant that he is (exceptional)****, which in this context means that because of unusual circumstances [he] is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances.* ***State v. Lemons***, 942 So.2d 33, (La 2006).

Movant, in compliance with La. C.Cr.P. Art. 905.(5)(a)(f) & (h) presents mitigating factors that warrants a resentence: (a) Offender has no significant prior history of criminal activity. Movant submits

that he is a first time felony offender, with no prior convictions. (f) The movant was (17) years old during the commission of the crime. (h) Other mitigating factors are included in this matter, which are not limited to, but are noted as follows: (1) The movant has served over (50) years in actual custody; (2) movant has responded well to rehabilitation programs at the prisons; (3) movant has maintained a good conduct record for years in prison (4) movant has amazingly maintained family support for over fifty years and his family has written letters in support of his release; (5) if released, the movant would not be living in the state of Louisiana, for, the movant's family live in the state of Hawaii and want him to spend the remainder of his life there with them; and (6) the continued incarceration of Henry Montgomery, after serving (50) years in actual custody serves no legitimate reason other than excessive punishment.

[8] Movant avers, that this court now has inherent authority to resentence the movant to a fixed number of years. Whereas, the United Supreme Court has firmly determined that a mandatory life sentence without parole, for a person who was convicted as a juvenile is unconstitutional. **Miller, supra.** As indicated before, there are limited statutory options available in order to cure the instant illegal sentence.

First, the court has discretion in modifying the verdict and sentence to wit La.C.Cr.P Art. 822 states in part A.(1) Should the court on its own motion or on motion of the defendant consider setting aside a

guilty verdict or a plea of guilty or, after the sentence is imposed, consider amending or modifying the sentence imposed, the district attorney shall be notified and the motion shall be tried contradictorily with the district attorney unless the district attorney waives such contradictory hearing. (2) Such motions include but are not limited to motions for new trial, motions in arrest of judgment, motions for amendment, modification, or reconsideration of sentence, and motion for modification of conditions of probation or termination of probation.

Movant understands the potential legal argument of the state, which implies that once a sentence has began to be served and (30) days has lapsed, said sentence is final. La.C.Cr.P Art.881. Also, movant understands, that in past instances where a trial court's judgment was reversed for granting a modification of a life sentence after (17) years was served on said life sentence, the resentence were held erroneous. ***State v. McCoy***, 869 So.2d 918 (La.App. 4 Cir. 2004), writ denied, 883 So.2d 1044 (La. 10-15-2004). However, the movant's case presents a total different legal consequence. For, the above mentioned case and statue didn't have the blessings of the U.S. Supreme Court's decision in **Miller** and **Graham**. The Court held: "*A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*"). **Miller, supra, 2012 WL-3368659 page 8.** Thus, as indicated before, the movant now suffers from having an illegal sentence

and this sentence must be vacated and a determinate sentence pronounced. La.C.Cr.P. Art. 879.

CONCLUSION

Wherefore, the movant pray that the court correct the current illegal sentence and pronounce a more civil sentence.

/s/ Henry Montgomery

[9] [Certificate Of Service Omitted]

---

[10] ORDER

IT IS HEREBY ORDER AND DECREED, that the Custodian/Warden of the Louisiana State Penitentiary at Angola, Louisiana is to produce in person, Henry Montgomery # 071240 for the purpose of attending a contradictory hearing at the 19th Judicial District Court, East Baton Rouge Parish, Louisiana, on or before the ___ day of ___, 201___, at ___ O'Clock___.M.

Signed on this ___ day of ___, 201___.

/ _____
Signature of The Judge

ATTACHED EXHIBITS

(a) Indictment & Court Minutes

(b) Institution Conduct Report

I received a certified copy of the within Bill of Information and one certified copy of the Jury Venire for the week beginning Jan 27, 1964, and on the 12 day of Dec. 1963. I served the said copies on the within named defendant in this Parish of East Baton Rouge, State of Louisiana by handing said copies to the said Henry Montgomery in person.

/s/ [Illegible]
Deputy Sheriff, Parish East
Baton Rouge, La.

[February 4, [Illegible]
Guilty as charged
Edward P. [Illegible]
Foreman]

I received a certified copy of the within Bill of Information and one certified copy of the Jury Venire for the week beginning Jan 27, 1964, and on the 20th day of January 1964. I served the said copies on the within named defendant in this Parish of East Baton Rouge, State of Louisiana by handing said copies to the said Henry Montgomery in person.

/s/ [Illegible]
Deputy Sheriff, Parish East
Baton Rouge, La.

[3-18-69: [Illegible] 3-15-[Illegible]
3-19-69: s/ LSP – Life,
appealed [Illegible] 5-16-69 –
[Illegible] to 5-16-69 [Illegible]]

No. 48:489

NINETEENTH
JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

HENRY MONTGOMERY (CM)

~~alias "Wolf Man"~~

INDICTMENT

MURDER

[a True Bill]

~~A TRUE BILL~~

/s/ [Illegible]
Foreman.

[illegible]

Filed Nov 18, A. D. 1963

/s/ [Illegible]
by Clerk 10th Judicial District Court

[Illegible]

[2-7-69 [Illegible]
3-11-69
3-11-69 [Illegible] 3-18-69]

WITNESSES:

2-4-65: [Illegible]
2-8-65 [Illegible]
w/o [Illegible]

[Illegible]
11/20/63 mot. of arr. 11/25/[Illegible]
11/[Illegible]/63 passed until 11/[Illegible]
11/26/63 [Illegible]
[Illegible]
[Illegible] 1/27/64 services
[Illegible] set for pleas
to be argued 1/6/64
1/10/64 [Illegible]
[Illegible]
[Illegible]
[Illegible]
1/20/64 – [Illegible]
1/23/64 [Illegible]
[Illegible]
1/24/64
1/24/64 [Illegible]
[Illegible]
1/29/64 [Illegible]
[Illegible]
[Illegible]
10/26/64
10/30/64 mot. for new trial [Illegible]
[Illegible] for [Illegible] for new third motion in [Illegible], argued, [Illegible] & overruled.
accused [Illegible]
1-6-69; assigned [Illegible] Feb. 6, 1969 – [Illegible]
2-6-69 Trial by jury begins

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared Perry M. Johnson, Clerk of Court, in and for the Parish and State aforesaid, who being by me duly sworn, said:

THAT on March 19, 1969 /xxxxxxxxxxxxxxx [sic] the accused was sentenced to life imprisonment in the La. State Pentientary [sic]

STATE OF LOUISIANA

VS

HENRY MONTGOMERY

Number 48,489 of the criminal docket of said Court:

THAT: an order of appeal was granted defendant, on March 19, 1969 returnable to the Honorable Supreme Court of the State of La., on May 16, 1969

THAT: to this date, the transcript of the testimony has not been completed, and due to the large number of transcripts that we have at this time, the Court reporter states that it will be impossible for her to complete the said transcript of testimony in time for the return date, May 16, 1969.

It will be impossible for this office to complete the transcript in time for the filing of this matter on the said return date, and affiant now requests an

extension of ninety (90) days in which to complete and file same.

/s/ Perry M. Johnson
Clerk of Court
Parish of East Baton Rouge

BY _____
Chief Deputy Clerk of Court

SWORN TO AND SUBSCRIBED BEFORE ME, THE Undersigned on this 16 day of May, 1969.

/s/ Juanita M. McNeil
Deputy Clerk of Court
and ex-Officio
Notary Public,
Parish of East Baton Rouge

STATE OF LOUISIANA
VS
HENRY MONTGOMERY

NO. 48,489 – Criminal Docket 1

19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

IN THIS CAUSE now comes PERRY M. JOHNSON, Clerk of the Nineteenth Judicial Court for the Parish of East Baton Rouge, State of Louisiana, and

moves this Honorable Court to grant an extension of ninety (90) days from May 16, 1969 in which to file the transcript of appeal in the above entitled and numbered cause, for the reasons set forth in the affidavit annexed hereto and made part hereof.

/s/ Perry M. Johnson
Clerk, 19th Judicial District
Parish of East Baton Rouge
State of Louisiana

BY _____
Chief Deputy Clerk of Court

ORDER

The foregoing motion and annexed affidavit considered, it is ordered that PERRY M. JOHNSON, Clerk of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, be granted an extension of ninety (90) days from May 16, 1969 in which to file the transcript of appeal in the above entitled and numbered cause.

This 16th day of May, 1969

/s/ [Illegible]
Judge

FILED

MAY 16 1969

/s/ Juanita M. McNeil
DY. CLERK OF COURT

LeRoy Cobb Forman
Verdict – Guilty Without Capital Punishment

/s/ Leroy Cobb

FILED

Feb. 8 1969

/s/ [Illegible]
DY. CLERK OF COURT

TO: CLERK OF COURT 19TH
JUDICIAL DISTRICT COURT
P.O. BOX 1991
BATON ROUGE, LA. 70821

FROM: HENRY MONTGOMERY # 071240
LOUISIANA STATE PRISON
ANGOLA, LA. 70712

DATE: ~~AUGUST~~ ~~27~~ 2012.

Please find enclosed a Motion For Procedural Default and a Motion For Summary Judgment filed by the petitioner, Henry Montgomery # 071240. Also, note, that petitioner has attached orders to both motions.

Thank you for your cooperation.

/s/ Henry Montgomery

IN THE

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY [PETITIONER]	* *	CASE NO. 48-489
VERSUS	* *	SECTION:_____
STATE OF LOUISIANA [RESPONDENT]	* *	FILED:_____

****

MOTION FOR PROCEDURAL DEFAULT

Now Into The Court, in Proper Person, Comes, Henry Montgomery, the petitioner in the above captioned case, who, respectfully urges the Court to grant the instant Motion For Procedural Default based upon the information presented herein and following:

i

Petitioner avers, that on July 13, 2012, he filed a Motion To Correct An Illegal Sentence pursuant to the recent U.S., Supreme Court ruling in **Miller v. Alabama**. For, the petitioner received a life sentence as a juvenile offender.

ii

Further, the petitioner filed said motion pursuant to the Prison Legal Mail Program, thereby, placing said motion in the hands of prison officials. *See: Attached Documents.*

iii

Moreover, the petitioner served an original copy of said motion to the 19th Judicial District Attorney Office. *See: Attached Document.* However, the State has not answered said motion within the requested (30) days.

Petitioner contends, that the State's failure to file a response is clear indication, that it concedes to petitioner's facts and argument are true and accurate. Therefore, the State should be procedurally prohibited from filing any late opposition to petitioner's request for relief.

Wherefore, petitioner pray that his request for procedural default against the State be granted.

/s/ Henry Montgomery

ORDER

IT IS HEREBY ORDERED AND DECREED THAT PETITIONER'S MOTION FOR PROCEDURAL DEFAULT BE GRANTED.

Done on this _____ day of _____, 2012.

/_____

Signature of The Judge

_____

OFFENDER'S REQUEST FOR LEGAL/INDIGENT MAIL

NAME: Henry Montgomery

NUMBER: 071240

LOCATION: Hic 3

BALANCE IN YOUR DRAWING ACCOUNT: $_____

LIST EACH ITEM TO BE MAILED
GIVE THE NAME AND COMPLETE ADDRESS OF EACH PIECE TO BE MAILED:

19th Judicial District Attorney
name

222 St. Louis Street
address

Baton Rouge, La 70802
city, state, zip code

19th Judicial District Court
name

P.O. Box 1991
address

Baton Rouge, La. 70821
city, state, zip code

~~/s/ Henry Montgomery~~
name

address

city, state, zip code

ANY DELIBERATE MISREPRESENTATION WILL RESULT IN YOUR MAIL BEING RETURNED

/s/ Henry Montgomery 071240
offender's signature and number

/s/ [Illegible initials]
classification officer

7-13-12
date

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS
CORRECTIONS SERVICES
OFFENDER FUNDS WITHDRAWAL REQUEST

CODE	DRAWING ACCOUNT
73	☐ Offender club
74	☐ Outside purchase ☐ Family member ☐ Educational courses ☐ Outside bank savings acct# 2 [Illegible] ☐ Newspaper ad for clemency/pardon. ☐ Other: _____
79	☐ Court Cost – Civil action number _____
94	☐ Savings Bond

CODE	SAVINGS ACCOUNT
94	☐ Savings Bond
79	☐ Court Cost – Civil action number _____
82	☐ Educational courses

CODE	TRANSFERS No check will be produced
68T	☐ Transfer from drawing account to savings.

Note: Print name and address in the payee section to the right. Attach necessary documents including a stamped, self-addressed envelope for all outside mail

DOC NUMBER	NAME: LAST NAME, FIRST NAME, INITIAL
71240	Montgomery, Henry [Illegible]

LIVING QUARTERS	DATE OF REQUEST (MO. DAY YEAR)	TOTAL AMOUNT
[Illegible]	7 / 13 / 12	$3.80

WRITTEN AMOUNT _____ DOLLARS

PAYEE:

VENDOR NO.

OFFENDER MUST ATTACH A STAMPED, ADDRESSED ENVELOPE FOR ALL OUTSIDE MAIL

NAME
General Fund

ADDRESS

CITY STATE ZIP

OFFENDER SIGNATURE
Henry Montgomery

REQUEST DENIED, REASON:

RIGHT THUMB PRINT

VERIFIED BY:

TITLE:

APPROVED BY:

TITLE:
/s/ John M. Joseph Jr.

IN THE
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY
(PETITIONER) * * CASE NO. **48-489**

VERSUS * * SECTION:_____

STATE OF LOUISIANA
(RESPONDENT) * * FILED:_____

****

MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 4, 2012)

NOW INTO THE COURT, in proper person, Comes, Henry Montgomery, the petitioner in the above numbered case, who, pleads the court to grant summary judgment predicated on the facts presented herein, to wit:

i

The petitioner filed an original Motion To Correct An Illegal Sentence into the district court on July 13, 2012. The basis for said motion was in lieu of the Supreme Court decision in **Miller v. Alabama**.

ii

Petitioner did serve the Respondent, 19th Judicial District Attorney Office with an original copy of said motion. Thus, the purpose of serving the

Respondent was to put the respondent on notice of petitioner's intention and to receive any oppositional arguments the State may have had. However, the State did not file any opposition to said motion nor did the State seek an extention [sic] of time to file oppositions [sic] briefs.

iii

Therefore, the petitioner has filed a Motion To Procedurally Default the State from filing a late opposition to his motion to correct illegal sentence. For, petitioner contends, that the State's failure to answer is clear evidence that it has no legal ground to oppose the relief requested by your petitioner.

iv

Petitioner now seeks a summary judgment to be entered by the court on the merits of his claim. Moreover, petitioner avers, that his sentence must be in compliance with the law, For, the U.S. Supreme Court stated in ***Miller v. Alabama***, that it is a violation of the U.S. Constitution 8th Amendment to sentence a juvenile defendant to a life sentence without the benefit of parole or a viable manner of release. Especially, when considering the offender's maturity and rehabilitation. **Miller, supra.**

v

Petitioner contends, that he was sentenced under the provision of LSA-R.S. 14:30, which provides for a mandatory life sentence, without benefit of probation, parole or suspension of sentence. Furthermore, LSA-R.S. 15: 574.4 prohibits a person who is serving a life sentence to be parole eligible until said life sentence has been commuted to a fixed number of years. Since, there is no legal statutory provision authorizing the granting of parole eligibility to the petitioner in the case at hand, then there must be another solution.

Moreover, a similar situation has occurred in the past. In ***State v. Craig***, 340 So.2d 191 (La. 1976), the defendant was initially given a death sentence for aggravated rape. However, the U.S. Supreme Court determined Craig's sentence unconstitutional and the defendant was resentenced to (20) years.

Petitioner contends, that his case has the identical circumstances as that of **Craig, supra.** Furthermore, the petitioner has to be resentenced under the provision of LSA-R.S. 14:31 manslaughter, which is responsive to the greatest punishment from his original illegal sentence.

vi.

Therefore, petitioner request that the court consider the mitigating circumstances presented within his original motion to correct illegal sentence. Thus, after duly considering the petitioner's age of (17)

years old during the onset of the case and his (50) years served in actual custody, the petitioner's situation is ripe for a fresh sentence.

Wherefore, the petitioner pray, that the instant motion be granted and he be remanded to court for resentencing.

/s/ Henry Montgomery

ORDER

IT IS HEREBY ORDERED THAT THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. IT IS FURTHER ORDERED THAT THE CUSTODIAN SHALL PRODUCE THE BODY OF HENRY MONTGOMERY # 071240 TO APPEAR BEFORE THE 19TH JUDICIAL DISTRICT COURT, EAST BATON ROUGE, LOUISIANA, on or before the _____ 201__.

/_____
Signature of The Judge

[Certificate Of Service Omitted]

STATE OF LOUISIANA DOCKET No. 48,489, DIV. II

19TH JUDICIAL DISTRICT COURT

VERSUS

PARISH OF EAST BATON ROUGE

HENRY MONTGOMERY STATE OF LOUISIANA

RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL

(Dec. 13, 2012)

NOW INTO COURT, comes the State of Louisiana through undersigned counsels, who respectfully move the court as follows:

On July 13, 2012 petitioner Henry Montgomery filed a *pro se* motion to correct illegal sentence on the basis that his mandatory life sentence for murder was unconstitutional in light of *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). On September 20, 2012, this Court appointed the Office of the Public Defender to represent petitioner and set the matter for hearing on January 9, 2013. Petitioner, however, failed to notify the Attorney General's Office that he was attacking the constitutionality of the mandatory life sentence provision of a statute. In this case, the Defendant has urged this Court that a particular statute is unconstitutional, namely La. R.S. 14:30.1. The Office of the Louisiana Attorney General has a discretionary right to respond to such a

challenge and represent the State with respect to that challenge. *See* La. R.S. 13:4118;[1] La. C.C.P. art. 1880;[2] La. R.S.49:257(C).[3] The Attorney General's Office has chosen to respond to this motion and represent the State in this matter, along with the District Attorney of this judicial district.

Memorandum in Opposition

The state prays that this Court deny the defendant's motion to correct illegal sentence because

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[1] "Prior to adjudicating the constitutionality of a statute of the state of Louisiana, the courts of appeal and the Supreme Court of Louisiana shall notify the attorney general of the proceeding and afford him an opportunity to be heard. The notice shall be made by certified mail. No judgment shall be rendered without compliance with the provisions of this Section; provided where the attorney general was not notified of the proceeding, the court shall hold adjudication of the case open pending notification of the attorney general as required herein."

[2] "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In a proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard. If the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

[3] "Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed."

Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) is not retroactive to his case.

At the outset, the state notes petitioner's burden:

> Constitutional scrutiny favors the statute. Statutes are presumed to be valid, and the constitutionality of a statute should be upheld wherever possible. *State v. Brenner*, 486 So.2d 101 (La. 1986); *State v. Rones*, 223 La. 839, 67 So.2d 99 (1953). Because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality.

State v. Griffin, 495 So.2d 1306, 1308 (La. 1986); *See also State v. Schoening*, 2000-0903 pp. 5-6 (La. 10/17/00), 770 So.2d 762, 766 (this is a "strong presumption").[4]

In this instance, a motion for the correction of an illegal sentence is the proper procedural vehicle. Petitioner cannot receive post conviction relief because that process does not allow for a correction of a sentencing error: "La. Code Crim. Proc. art. 930.3, which sets out the exclusive grounds for granting post-conviction relief, provides no basis for review of claims of excessiveness *or other sentencing error post-conviction.*" *State ex rel. Melinie v. State*, 1993-1380

---

[4] *Schoening* also makes clear that the Attorney General's right of response and representation extends to criminal cases and may be a basis for remand if notice is not given. 770 So.2d at 765-66.

(La. 01/12/96), 665 So.2d 1172 (citations omitted) (emphasis added).

Miller v. Alabama is not retroactive to cases whose direct review has concluded.

When a claim is presented on collateral review in Louisiana, this Court must apply the *Teague* standard for retroactivity. *State ex rel. Taylor v. Whitley,* 606 So.2d 1292, 1296 (La. 1992). In order to determine retroactivity under *Teague v. Lane,* 489 U.S. 288, 292, 109 S.Ct. 1060, 1065, 103 L. Ed. 2d 334 (1989), this Court must apply a three-step process:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed'. and 'determine whether a state court considering [the defendant's] claim. at the time his conviction became final would have felt **compelled** by existing precedent to conclude that the rule [he] seeks was required by the Constitution'
>
> Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle

Caspari v. Bohlen, 510 U.S. 383, 390, 114 S.Ct. 948, 953, 127 L. Ed. 2d 236 (1994) (emphasis added)

(citations omitted). Petitioner's conviction became final in the 1960's. All litigation in this case since that time is considered collateral review.

Applying *Teague*, there is no question that *Miller v. Alabama* created a new rule of constitutional law. The Court's majority counted 29 jurisdictions that "make a life-without-parole term mandatory for some juveniles convicted of murder in adult court." 132 S.Ct. at 2471.[5] *Miller* also overruled, in part, the holding of *Harmelin v. Michigan*, which held that "death is different" and non-capital sentences do not require application of the Court's 'individualized sentencing' capital jurisprudence. 501 U.S. 957, 994, 111 S.Ct. 2680, 2701, 115 L. Ed. 2d 836 (1991); *Miller*, 132 S.Ct. at 2470.[6]

---

[5] *Miller* constitutionally limited numerous state statutes, including the one under which the defendant was sentenced. Westlaw lists the following statutes as Constitutionally limited: "**LSA-R.S. 1430(C)**, 1430.1(B)V.T.C.A., Penal Code § 12.31(a)Code 1975, § 13A-5-45(f)Wests A.C.A. § 5-4-104(b)Code 1975, § 13A-6-2(c)A.R.S. § 13-752C.G.S.A. § 53a-35a(1)11 Del.C. § 4209(a)West's F.S.A. § 775.082(1)HRS § 746-656(1) (1993)L.C. § 18-4004M.C.L.A. § 791.23-4(6)(a)M.S.A. § 609.106, subd. 2Neb.Rev.St. § 29-2522RSA 630:1-a(III)18 Pa.C.S.A. § 1102(a, b)61 Pa.C.S.A.§ 6137(a)(1)SDCL §§ 22-6-1(1), 24-15-413 V.S.A. § 2311(c)West's RCWA 10.95.030(I)." *Id.* at 2455 (West, 2012) (emphasis added).

[6] The State concedes that whether one uses the term "overrules" depends, in part, on one's point of view. The Court in *Miller* explicitly found "Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*." *Id.* at 2470. However, the term "overruled in part" is proper because Courts have traditionally applied *Harmelin* to juvenile defendants, as well as adult defendants. *See e.g. State v. Pilcher*, 27,085 (La. App. 2nd

(Continued on following page)

Further, the Court's majority in *Miller* found that its decision in *Graham v. Florida*[7] did not compel a *similar* outcome in *Miller*:

> *Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, ***Graham's* flat ban on life without parole applied only to nonhomicide crimes**, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm.
>
> *Miller,* 132 S.Ct. at 2465 (citing *Graham,* 130 S.Ct. at 2027) (emphasis added).

The dissent in *Miller* properly observed:

> In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual. It instead claims that precedent **"leads to"** today's decision, primarily relying on *Graham* and

---

Cir. 05/10/95), 655 So. 2d 636, 637-44, *writ denied,* 1995-1481 (La. 11/13/95) (Here, the Second Circuit specifically applied *Harmelin* to a life sentence for murder involving a fifteen year old defendant).

[7] *Graham* held: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham v. Florida,* 130 S.Ct. 2011, 2034, 176 L. Ed. 2d 525 (2010).

> *Roper* Petitioners argue that the reasoning of those cases "compels" finding in their favor. The Court is apparently unwilling to go so fax, asserting only that precedent points in that direction. But today's decision invalidates the laws of dozens of legislatures and Congress. This Court is not easily led to such a result If the Court is unwilling to say that precedent compels today's decision, perhaps it should reconsider that decision.

Id. at 2480 (Roberts, C.J., dissenting (emphasis added).

This federal circuit recently found that *Graham* was a new rule of constitutional law for the purposes of *Teague. In re Sparks,* 657 F.3d 258, 260 (5th Cir. 2011). Like *Graham, Miller* clearly states a new rule of constitutional law that was not previously available: the case was certainly the first recognition that the Eighth Amendment bars the imposition of life imprisonment without parole for homicide offenders under age eighteen who were not afforded an opportunity to prove that they deserve a lesser sentence. *See Id. See also Miller,* 132 S.Ct. at 2466, n.6, 2474-75. *Miller* is clear that all the Eighth Amendment requires with respect to a juvenile who is convicted of a homicide is a discretionary sentencing regime and allows for the *possibility* of a sentence of life without parole. *Id.*[8] Since petitioner is seeking collateral relief

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[8] The following passages are from the majority in *Miller*: "But contrary to the dissents' charge, our decision today retains

(Continued on following page)

and because *Miller* is a new rule, petitioner must show that he qualifies for one of the two exceptions under *Teague*.[9]

The "watershed" exception is clearly inapplicable here because *Miller* has nothing do to with the innocence or guilt of the defendant: "As the plurality cautioned in *Teague,* '[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of **innocence or guilt**, we believe it unlikely that many such components of basic due process have yet to emerge.'" *Graham v.*

---

that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

Discretionary sentencing in adult court would provide different options: There, a Judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate.

Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller,* 132 S.Ct. at 2466, n.6, 2474-75.

[9] The first exception is for new rules that place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' . . . The second exception is for ''watershed rules of criminal procedure' implicating the fundamental fairness *and accuracy* of the criminal proceeding.' . . . " *Bohlen,* 510 U.S. at 396, 114 S.Ct. at 956 (emphasis added) (citations omitted).

Collins, 506 U.S. 461, 478, 113 S.Ct. 892, 903, 122 L. Ed. 2d 260 (1993) (citing *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077) (emphasis added); *See also Schriro v. Summerlin*, 542 U.S. 348, 351-53, 124 S. Ct. 2519, 2522-23, 159 L. Ed. 2d 442 (2004).

The "primary conduct" exception also does not apply. The simplest explanation of this conclusion involves comparing *Miller* to *Graham*. In *Sparks*, the Fifth Circuit held that the primary conduct exception applied to *Graham v. Florida*, making that case retroactive on collateral review:

> First, under the doctrine relevant here, a rule is deemed retroactive if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" As the Court explained in *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), this exception should be understood as extending "not only [to] rules forbidding criminal punishment of certain primary conduct but also rules **prohibiting a certain category of punishment for a class of defendants because of their status or offense**." *Id.* at 330, 122 S.Ct. 2242; *see also Schriro*, 542 U.S. at 351-52, 124 S.Ct. 2519.
>
> [T]he Supreme Court's decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect, *see, e.g.*,

> *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir.2002), as has the Court's decision in *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), barring the execution of juvenile offenders, *see Arroyo v. Dretke*, 362 F.Supp.2d 859, 883 (W.D.Tex.2005), *aff'd on other grounds sub nom. Arroyo v. Quarterman*, 222 Fed.Appx. 425 (5th Cir.2007) (unpublished) (per curiam). ***Atkins* and *Roper* both "prohibit[] a certain category of punishment for a [certain] class of defendants because of their status or offense,"** *Penry*, 492 U.S. at 330, 109 S.Ct. 2934; so too does *Graham*, which bars the imposition of a sentence of life imprisonment without parole on a juvenile offender. By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*.

Sparks, 657 F.3d at 261-62 (emphasis added) (citation omitted).

Unlike *Roper* or *Graham*, *Miller* did not **categorically** prohibit life without parole for juvenile offenders who commit a homicide:

> **Our decision does not categorically bar a penalty for a class of offenders or type of crime** – as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentence follow a certain process – considering an offender's youth and attendant

> characteristics – before imposing a particular penalty.
>
> *Miller,* 132 S.Ct. at 2471 (emphasis added).[10]

In short, since it is not "beyond the power of the criminal lawmaking authority to proscribe" life without parole for a juvenile who commits a homicide, "it necessarily follows that this Court has [not] 'made' that new role retroactive to cases on collateral review [under the primary conduct exception]." *See Sparks,* 657 F.3d at 262 (citing *Tyler v. Cain,* 533 U.S. 656, 669, 121 S.Ct. 2478, 2486, 150 L. Ed. 2d 632 (2001), (O'Connor, J., concurring).

It is important to note that "*Teague* by its terms applies only to procedural rules " rather than to new substantive rules. *Bousley v. United States,* 523 U.S. 614, 620, 118 S. Ct. 1604, 1610, 140 L. Ed. 2d 828 (1998). Therefore, one must determine whether the new rule announced in *Miller* is substantive or procedural:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See *Bousley, supra,* at 620-621, 118 S.Ct. 1604 (rule

---

[10] *See also Conley v. State,* ___ N.E.2d ___, 2012 WL 3570390, 1-10 (Ind. 2012) (On July 31, 2012, the Indiana Supreme Court found, under *Miller v. Alabama,* juvenile life without parole was permissible for a seventeen-and-a-half-year-old who murdered his ten-year-old brother: "Our holding that the life without parole sentence is not unconstitutional is not altered by *Miller.*")

> "hold[s] that a statute does not reach certain conduct" or "make[s] conduct minimal"); *Saffle, supra,* at 495, 110 S.Ct. 1257 (rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of . . . punishment on a particular class of persons"). In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural. See *Bousley, supra,* at 620, 118 S.Ct. 1604.
>
> *Schriro v. Summerlin,* 542 U.S. 348, 353, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (underlined emphasis added) (italicized emphasis in original).

Again, as the Fifth Circuit indicated in *Sparks,* cases such as *Atkins, Roper*, and *Graham,* prohibited the imposition of punishment on a particular class of persons: in *Atkins* the Supreme Court held that the mentally retarded can *never* be executed, in *Roper* the Supreme Court held that juveniles can *never* be executed, and in *Graham* the Supreme Court held that life sentences without parole consideration for juvenile offenders in non-homicide cases are *always* unconstitutional. *Sparks,* 657 F.3d at 260, 262. Significantly, *Miller* did not alter the class of persons the law punishes, but only restricted how juveniles can receive a life without benefit sentence in a homicide case by mandating a procedure which takes an individual juvenile offender's characteristics into consideration. The Supreme Court in *Miller* did not place a life sentence without parole for a juvenile homicide offender beyond the power of the criminal making

authority to proscribe: "By contrast, decisions of this Court holding that a *substantive* federal criminal statute does not reach certain conduct, like decisions placing conduct "'beyond the power of the criminal law-making authority to proscribe,'" *Bousley,* 523 U.S. at 620 (citations omitted) (emphasis added). All that *Miller* requires is that there is a *procedure* in place to take account of possible mitigating circumstances.

The Court in *Miller* derived its holding from two separate lines of cases: 'categorical ban' cases, such as *Graham* and *Roper,* but also from its 'individualized sentencing' cases, such as *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Miller,* 132 S.Ct. at 2463-68. While *Sumner, Eddings,* and *Lockett* were decided prior to *Teague,* more recent 'individualized sentencing' cases decided after *Teague* were not found to be retroactive. *See e.g. Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L. Ed. 2d 415 (1990); *Cordova v. Collins,* 953 F.2d 167 (5th Cir. 1992); *Wilcher v. Hargett,* 978 F.2d 872 (5th Cir. 1992); *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L. Ed. 2d 260 (1993); *Schriro v. Summerlin,* 542 U.S. at 348.

One might argue that *Miller* was intended to be retroactive because petitioner Kuntrell Jackson's case was decided on collateral review. *Miller,* 132 S.Ct. at 2461. The Court certainly would not have made such a complex decision by implication and surely did not

intend to do so. Although *Miller* says nothing on this point, there is a reasonable explanation:

> Moreover, because petitioner [the State] has not argued that Stumpf's habeas claims were barred as requiring announcement of a new rule, we do not apply the rule of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to this case.

Bradshaw v. Stumpf, 545 U.S. 175, 182, 125 S.Ct. 2398, 2405, 162 L. Ed. 2d 143 (2005) (citations omitted)).[11] It does not appear that the state argued that Jackson's claim would be barred by *Teague* and its progeny. *See Jackson v. Norris,* ___ S.W.3d ___, 2011 Ark. 49 (2011).

In short, because the Court in *Miller* did not categorically ban a sentence of life without parole for a juvenile defendant, *Miller* is not retroactive under the "primary conduct" exception. Since neither exception applies, *Miller* is not retroactive in this or any case under *Teague.*

Since *Miller* was decided, at least two courts in Florida have found *Miller* to be not retroactive.

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[11] Additionally, the Court decided *Roper v. Simmons,* without mentioning retroactivity, even though Simmons was seeking collateral review, 543 U.S. at 559, 125 S.Ct. at 1189. In determining the retroactivity of *Roper,* no effect was given to the fact that *Roper* was decided on collateral review. *Baez Arroyo v. Dretke,* 362 F. Supp. 2d 859, 882-84 (W.D. Tex. 2005); *aff'd sub. nom. Arroyo v. Quarterman,* 222 F. App'x 425, 426-27 (5th Cir. 2007).

Although not explicitly based on *Teague*, Florida uses a similar test. *See Geter v. State*, 2012 WL 4443860 (Fla. Dist. Ct. App. 2012); *Gonzalez v. State*, 2012 WL 5233454 (Fla. Dist. Ct. App. 2012); *See also Hughes v. State*, 901 So.2d 837, 847 (Fla. 2005) ("While the standards of *Teague* are different from those of *Witt* [which controls Florida cases], they are based on many of the same concerns.") (Citations omitted).[12] The Louisiana Supreme Court has said nothing yet on the retroactivity issue. *See State v. Simmons*, 2011-1810 (La. 10/12/12), 2012 WL 4856210 (per curium [sic]).

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[12] Another Florida case summarized some of the recent cases with respect to *Miller*: "*Miller* was decided on June 25, 2012, during the pendency of Washington's appeal. Despite the Supreme Court's announcing a new rule of law for the conduct of criminal sentencing for juveniles, "the rule must be applied to 'all cases, state or federal, pending on direct review or not yet final.'" *State v. Fleming*, 61 So.3d 399, 403 (Fla.2011) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). *Accord Smith v. State*, 598 So.2d 1063, 1066 (Fla.1992). *See also People v. Banks*, 2012 WL 4459101 (Colo.App.2012). *But see, Gonzalez v. State*, No. 1D12-3153 (Fla. 1st DCA Oct.12, 2012) (denying Gonzalez' petition for a writ of habeas corpus and adopting, in its entirety, the reasoning of the Third District Court of Appeal in *Geier v. State*, 2012 WL 4448860 (Fla. 3d DCA Sept.27, 2012), holding *Miller* inapplicable to cases that were final before *Miller* was decided, by applying the retroactivity test approved by the Florida Supreme Court in *Witt v. State*, 387 So.2d 922 (Fla.1980), and concluding, *Miller* "was not of fundamental significance" but, instead, was "a procedural change in law" regarding criminal sentencing, and, thus, could not be applied retroactively)." *Washington v. State*, 2012 WL 5382184, 1, n.2 (Fla. Dist. Ct. App. 2012) (emphasis added).

Most importantly, on November 15, 2012, the first opinion in the United States that determined whether *Miller* was retroactive under the *Teague* standard was handed down. In *People v. Carp*, ___ N.W.2d ___, 2012 WL 5846553 (Mich. App. 11/16/2012), the Michigan Court of Appeals handed down a lengthy opinion which essentially restates the aforementioned argument. *Carp* held that *Miller* would not be retroactive under a *Teague* analysis.[13] The State respectfully requests that this Court review the *Carp* opinion, in particular pages 23-29 which mirror the *Teague* analysis above, and deny petitioner's motion on the basis that *Miller* does not retroactively apply to his case.

If Miller v. Alabama applies to petitioner, it does not require reducing his crime.

Should this Court deem *Miller* to apply retroactively, this Court should either wait for forthcoming legislative action or set an evidentiary hearing to weigh the *Graham/Miller* sentencing criteria and determine if petitioner is deserving of life without parole.[14] This Court should be guided by *Miller* in

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[13] *Carp* was disagreed with in *People v. Morfin*, ___ N.E.2d ___, 2012 WL 6028634 (Ill.App. 1 Dist. Nov. 30, 2012) and *People v. Williams*, ___ N.E.2d ___, 2012 WL 6028833 (Ill. App. 1 Dist. Nov. 27, 2012).

[14] "So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a States harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes

(Continued on following page)

making its decision on whether petitioner should or should not have the parole eligibility restriction removed from his sentence.

The Louisiana Supreme Court's post-*Graham* decisions only require removal of the absolute bar to parole consideration, which is also all that would be allowed here. *See Dyer,* 77 So.3d at 928; *State v. Leason,* 2011-1757 (La. 11/23/11) 77 So.3d 933; *State v. Shafer,* 2011-756 (La. 11/23/11) 77 So.3d 939. It is important to note that the Louisiana Supreme Court specifically rejected resentencing the defendant to the next lesser and included responsive verdict *See e.g. Dyer,* 77 So.3d at 929-31.

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consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. *See, e.g., Graham,* 560 U.S., at ___, 130 S.Ct., at 2032 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J.D.B. v. North Carolina,* 564 U.S. ___, ___, 131 S.Ct. 2394, 2400-2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller,* 132 S.Ct. at 2468.

The State recognizes that Act 466 of the 2012 Louisiana Legislative Session only provides parole for "any person serving a sentence of life imprisonment who was under the age of eighteen years at the time of the commission of the offense, except for a person serving a life sentence for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1). " La. R.S. 15:574.4(D)(1). Considering *Miller,* the Legislature should act in its first session of 2013 and provide a legislative solution for juvenile offenders convicted of murder in Louisiana. If the Louisiana Legislature does not act, then the Louisiana Supreme Court has set a precedent for determining such a date. *See State v. Dyer*; *State v. Leason*; *State v. Shafer, supra.* In accordance with the *Dyer* line of cases, the rule of severability would apply to the more recent parole amendment and petitioner would be eligible for parole pursuant to satisfying the requisites of recently enacted 15:574.4(D); *See* Acts 2012, No. 466, § 1.

WHEREFORE, the State prays that this Court deny petitioner's motion to correct illegal sentence.

Alternatively, the State prays for any and all other relief to which it is entitled.

RESPECTFULLY SUBMITTED,

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[Certificate Of Service Omitted]

TO: Clerk of Court-19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana

FROM: Henry Montgomery #071240
La. State Prison
Angola, La. 70712

DATE: December 18, 2012

Re: Traverse to State's Response Brief

Dear Clerk of Court,

Please find enclosed a traverse to the State response to my motion to correct illegal sentence. Also, please be advised, that I placed the motion in the hands of the prison classification officer to be mailed to the court, with a verified copy to be mailed to the 19th Judicial District Attorney.

As always, thank you for your consideration and have a blessed holiday.

Sincerely,

/s/ Henry Montgomery

IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY {Movant} * * CASE NO. **48-489**

VERSUS * * SECTION: **DIVISION-II**

STATE OF LOUISIANA, ET AL {Respondent} * * FILED: _____

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"Traverse To Respondent's Answer For Motion To Correct Illegal Sentence"

(Dec. 19, 2012)

MAY IT PLEASE THE COURT:

NOW INTO THE COURT, Comes, Henry Montgomery, in proper person, hereinafter referred to as the Movant in the above numbered case, who, respectfully lodges the instant "Traverse" in response to the answer filed by the Respondent. In support of these pleadings the following is duly noted:

i.

On December 17, 2012, the movant was informed by the dormitory security officer to report to the Main Prison Legal Mailroom. Upon arrival at the mail-room, the Movant signed for and was provided with a certified copy of the Respondent's answer to the Movant's Motion To Correct Illegal Sentence. Movant

contends that the substance of the Respondent's brief is the basis for the legal discussion that follows.

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Topic For Discussion

(a) Disparity in regards to the motion filed.

(b) Court appointed counsel.

(c) January 9, 2013 Hearing date.

(d) Miller v. Alabama; State v. Craig.

(a)

Movant avers, that on July 13, 2012, he filed a Motion To Correct Illegal Sentence into the 19th Judicial District Court pursuant to La.C.Cr.P. Arts. 822, 872 & 882, in compliance with the U.S. Supreme Court's ruling in ***Miller v. Alabama***, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (Decided on 6-25-12). Simultaneously to filing said motion, the Movant served the 19th Judicial District Attorney's office with a copy of said pleadings. However, after waiting several weeks with no response from the State, the Movant filed a Motion For Summary Judgment and Motion for Default. The movant was informed by the Clerk of Court, that there was no Illegal Sentence Motion filed. In fact, the Clerk stated that the only documents on file were a bill of information and Motion To Quash. See: (Attached Exhibit). Movant contends that the Respondent's reply brief on page one, openly admits that the movant did in fact file a

motion to correct an illegal sentence as opposed to the Clerk's previous assertions. Therefore, movant moves the Court to order the Clerk's records to reflect the filing of the illegal sentence.

(b)

The Respondent's brief on page one reveals, that on September 20, 2012, the Court appointed the Office of The Public Defender to represent the movant "ironically", the movant haven't received any notice from the court in regards to the appointment of counsel. For, movant initiated his motion to correct illegal sentence by virtue of pro se capacity. Furthermore, the appointed counsel never contacted the movant in order to properly assist with the currently filed motions. Therefore, appointed counsel's strategies may very well conflict with movant's litigation directions. To prevent any further conflict, movant request that the appointed counsel be ordered to contact the movant.

(c)

Movant avers, that he seeks confirmation as to the January 9, 2013 hearing date. Movant contends, that he would like the opportunity to call witnesses to testify to mitigating factors in the event the court resentences the movant. Such witnesses as family and friends will be willing to offer testimony in regards to lowering the movant's current sentence.

(d)

Movant would like to object to the State's mischaracterization of the "Motion To Correct Illegal Sentence" First, movant contends, that the State's assertion that the movant challenged a statutory provision of the Louisiana Revised Statue [sic] is misplace [sic] and incorrect. The movant's primary goal was to have an illegal 'unconstitutional' sentence corrected. Moreover, movant would point this Honorable Court's attention to the State's Response Brief page one, which provides in pertinent part the following: "*In this case, the Defendant has urged this Court that a particular statue* [sic] *is unconstitutional, namely La. R.S. 14:30.1*" see:(State's Response Brief page-1). Movant contends, that the State's claim is purely bogus. For, La.R.S. 14:30.1 is the laws pertaining to Second Degree Murder, to which wasn't introduced into law until 1973 during a Special Session. Wherefore, the movant was incarcerated ten years prior to the passing of H.B. III-Second Degree Murder.

Next, movant avers, that he dare not take the Court's attention down a long tangent trail as the State has done. However, movant contends, that the State's response brief is filled to the hilt with misleading arguments. Since, the movant has filed a "simple" motion to correct illegal sentence, requesting to be resentenced in compliance with the U.S. Supreme Court's ruling in **Miller v. Alabama**, it is unnecessary to elaborate on the frivolous jargon presented by the State. Such frivolous jargon consists of, but is not limited to: retroactivity of **Miller v. Alabama** in

regards to the case at hand. Logically speaking, if the movant is not challenging the constitutionality of a statue [sic] (R.S. 14-30.1-second degree murder), in which came into existence ten years after movant's arrest, then the State's entire retroactive argument is futile. For, the hub of movant's claim is relatively simple. "If, the U.S. Supreme Court's ruling in ***Miller*** forbids the permanent and eternal incarceration of Henry Montgomery's life imprisonment without benefit of probation, parole or suspension of sentence, then the court must resentence the movant.

Furthermore, movant contends, that the U.S. Supreme Court's ruling in Miller emancipated the movant from the (50) years of "dead-time", to which he has served on his mandatory life sentence. The magical words spoken by the High Court are noted in part as follows: "*We therefore hold that the Eight* [sic] *Amendment forbids a sentencing scheme that mandates life imprison without possibility of parole for juvenile offenders A State is not required to guarantee eventual freedom, but* ***must*** provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" ***Miller v. Alabama***, **supra**, citing ***Graham v. Florida***.

Movant contends that the issue of an unconstitutional sentence is not an uncommon event in the State of Louisiana. In the year 1972 the U.S. Supreme Court declared that the manner in which the death penalty was applied was unconstitutional. ***Furman v. Georgia***, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972). Thus, in response to Furman

ruling, all states with death row inmates, including Louisiana, automatically commuted the sentences of all the ex-death row inmates. In Louisiana, all death row inmates received a life sentence. However, in 1976 the U.S. Supreme Court reinstated the death penalty in ***Gregg v. Georgia*** and the process of replenishing death row began.

In the year 1976, the U.S. Supreme Court declared Louisiana's mandatory death penalty for first degree murder unconstitutional. ***Roberts v. Louisiana***, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). In response to the U.S. Supreme Court's ruling in Roberts, the State of Louisiana resentenced the defendants to the next most serious punishment. ***State v. Craig***, 340 So.2d 191 (La.1976). Movant contends, that his situation is identical to **Craig**. In the case of *Craig*, the defendant was placed on death row for the offense aggravated rape. After the ruling in **Roberts**, the defendant **Craig** had to be resentenced to a term of twenty years at hard labor. Normally, the offense of aggravated rape death penalty responsive charge would have been life imprisonment without benefit of probation, parole or suspension of sentence. However, since the La.C.Cr.P. art. 814 responsive verdict statue [sic] required that the next most serious punishment was simple rape-LSA-Revised State [sic] 14:43, the defendant Craig had to receive (20) years.

Movant avers, that the very same principles in which was found in **Craig** is identical to the case at hand. For, Henry Montgomery, movant was convicted

for first degree murder under the 1963 statue [sic]; therefore, under La.C.Cr.P. art. 814 the proper responsive sentence is manslaughter-LSA-Revised Statue [sic] 1431. This sentence carries a maximum penalty of (21) years. For, there exist [sic] no other legal sentence to apply to the case at hand.

The State in its Response Brief on page (8) attempts to convince this court to apply yet another illegal sentence. For, the State has suggested that this court resentence the movant to life imprisonment with parole eligibility to comply with Act 466 of the 2012 Louisiana Legislative Session. To further its argument the State cites La.R.S. 15:574.4(D)(1) and ***State v. Dyer***, ***State v. Leason***, and **Shafer**. Movant avers, that this argument is unreasonable, illogical, dumb, and goes totally against the law, not to mention common sense. For, LSA-R.S. 15:574.4(B) is the law the governs the case at hand. Under 15:574.4(B) no prisoner serving a life sentence shall be eligible for parole consideration until that sentence has been commuted to a fixed number of years. ***Bosworth v. Whitely***, 627 So.2d 629 (La.1993).

Next, the State suggests that this court prolong resentencing the movant until the legislature meets during the 2013 Fiscal Session. The movant has endured fifty (50) years or 18,250 days of pure hell and it is inconceivable to ask him to wait until the legislatures acts. For, the state supreme court has held; "In any criminal case it is the mandatory duty of the district court judge upon conviction, of a defendant to impose a sentence authorized or directed

by law, and if he does not impose a sentence authorized by law, the sentence is illegal, and the case is in the same condition as if **no sentence** at all has been imposed, and it must be remanded to the district court so that the judge may impose a legal sentence". ***State v. Johnson***, 220 La. 64, 55 So.2d 732 (1951).

CONCLUSION

Wherefore, the movant pray that this court correct the illegal life sentence, of life imprisonment without benefit of probation, parole or suspension of sentence, to which the U.S. Supreme Court has declared unconstitutional for juvenile offenders and resentence the movant pursuant to State v. Craig.

/s/ Henry Montgomery

[Certificate Of Service Omitted]

STATE OF LOUISIANA	DOCKET No. 48,489, DIV. II
VERSUS	19th JUDICIAL DISTRICT COURT
	PARISH OF EAST BATON ROUGE
HENRY MONTGOMERY	STATE OF LOUISIANA

SUPPLEMENTAL RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL

(Jan. 8, 2013)

NOW INTO COURT, comes the State of Louisiana through undersigned counsels, who respectfully move the court as follows:

Petitioner Henry Montgomery was a juvenile defendant convicted of murder and sentenced to the mandatory term of life imprisonment without benefit of parole, probation, or suspension of sentence. His conviction and sentence became final in 1969. On July 13, 2012 petitioner filed a *pro se* motion to correct illegal sentence on the basis that has [sic] mandatory life sentence for murder was unconstitutional in light of *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). On September 20, 2012, this Court appointed the Office of the Public Defender to represent petitioner and set the matter for hearing on January 9, 2013. On December 13, 2012, the District Attorney (and Attorney General) filed a response to petitioner's motion to correct

illegal sentence, arguing *Miller* did not apply retroactively to cases on collateral review. On January 4, 2013, petitioner filed a motion to continue the sentencing hearing so that he could address the retroactivity issue. The motion was granted and petitioner is now set to have a sentencing hearing later in 2013. The State now files the instant supplement so that this Court may deny petitioner's motion prior to the sentencing hearing and without necessity of a hearing.

Supplement to Memorandum in Opposition

This Court must deny the defendant's motion to correct illegal sentence without a hearing because *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) is not retroactive to his case.

On January 4, 2013, the Federal Fifth Circuit ruled in *Craig v. Cain* (Docket # 12-30035) that *Miller* **does not** apply retroactively to cases on collateral review. *Craig* involved a juvenile Louisiana defendant who was convicted of murder in the 19th JDC, Baton Rouge, Louisiana, and sentenced to the mandatory term of life without benefit of parole, probation, or suspension of sentence. Applying *Teague,* the Fifth Circuit determined in *Craig* that *Miler* does not retroactively apply to collateral review cases.[1]

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[1] See case of *State v. Dale Craig*, attached.

Louisiana is both under the jurisdiction of the Federal Fifth Circuit and employs the same retroactivity analysis as does the Fifth Circuit to cases on collateral review. More specifically, in *State ex rel. Taylor v. Whitley,* 606 So.2d 1292 (La. 1992), the Louisiana Supreme court adopted the retroactivity standard announced by the U.S. Supreme Court in *Teague [v. Lane]*[2] and then ruled that *Teague* applied to **all** state court cases on collateral review.[3]

The Fifth Circuit used *Teague* to rule that *Miller* does not apply retroactively to petitioner's case. Louisiana does not use a different retroactivity analysis, and the result can be no different. Accordingly, petitioner's motion to correct illegal sentence must be denied without a hearing because *Miller* does not apply to his case.

WHEREFORE, the State prays that this Court deny petitioner's motion to correct illegal sentence.

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[2] 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1988).

[3] *Whitley*, at 1296: "[W]e have yet to consider the issue of retroactivity on collateral review in light of *Teague*. We now do so, and adopt the *Teague* standards for all cases on collateral review in our state courts."

Alternatively, the State prays for any and all other relief to which it is entitled.

RESPECTFULLY SUBMITTED,

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DISTRICT ATTORNEY

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[Certificate Of Service Omitted]

STATE OF LOUISIANA	DOCKET NO. 48,489, DIV. II
VERSUS	19th JUDICIAL DISTRICT COURT
	PARISH OF EAST BATON ROUGE
HENRY MONTGOMERY	STATE OF LOUISIANA

ORDER

CONSIDERING THE ABOVE AND FOREGOING:

IT IS ORDERED, that petitioner's motion to correct illegal sentence be denied without a hearing.

Miller Alabama, 183 L.Ed.2d 407 (2012) does not apply retroactively to his case.

Baton Rouge, Louisiana, this ___ day of ___, 2013.

Judge, 19th Judicial District Court

Please serve a copy of notice of judgment to:

Section II Public Defender, Counsel for petitioner.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-30035

DALE DWAYNE CRAIG,

Petitioner-Appellant

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

Before HIGGINBOTHAM, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Dale Dwayne Craig's request for a certificate of appealability ("COA") to appeal from the district court's denial of his 28 U.S.C. § 2254 application. Craig has filed a motion asking this court to reconsider the denial in light of the United States Supreme Court's decision in *Miller v. Alabama,* 132 S. Ct. 2455 (2012). Additionally, Craig argues that his request for a COA was erroneously denied based on this court's application of the waiver doctrine.

In *Miller,* the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. Craig was seventeen at the time of his offense. He was originally sentenced to death; however, his sentence was commuted to life without the possibility of parole following the Supreme Court's decision in *Roper v. Simmons,* 543 U.S. 551 (2005). *Miller* was decided after 1997 when Craig's sentence became final, and Craig now seeks retroactive application of *Miller* in this collateral attack on his sentence.

A new rule is applied retroactively to cases on collateral review if it (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) "requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*

v. Lane, 489 U.S. 288, 307 (1989) (internal quotations omitted).

A threshold inquiry is whether the rule in question constitutes a "new rule." *E.g.*, *Beard v. Banks*, 542 U.S. 406, 411 (2004). "In general a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. A rule is thus new "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* When Craig's conviction became final, *Miller* was not dictated by precedent. Instead, *Miller* established for the first time a requirement of individualized sentencing outside the death penalty context. *See* 132 S. Ct. at 2470.

To overcome the general bar to retroactivity of new rules on collateral review, Craig must meet one of the two *Teague* exceptions. *Teague*, 489 U.S. 307. The first exception extends to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997). This exception appears to apply only when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants, not when a rule addresses the considerations for determining a sentence. For example, we have used *Teague's* first exception in applying prohibitions on the execution of defendants who are mentally handicapped or juveniles, and sentences of life imprisonment without parole for juveniles

convicted of nonhomicide offenses. *Bell v. Cockrell,* 310 F.3d 330, 332 (5th Cir. 2002) (retroactively applying *Atkins v. Virginia,* 536 U.S. 304 (2002)); *In re Sparks,* 657 F.3d 258, 262 (5th Cir. 2011) (citing *Arroyo v. Dretke,* 362 F. Supp. 2d 859, 883 (W.D. Tex. 2005)) (*Roper v. Simmons,* 543 U.S. 551 (2005)); *Sparks,* 657 F.3d at 262 (*Graham v. Bell,* 130 S. Ct. 2011 (2010)).

By contrast, the Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v. Singletary,* 520 U.S. 518, 539 (1997) (foreclosing retroactive application of *Espinosa v. Florida*, 505 U.S. 1079 (1992)); *Sawyer v. Smith,* 472 U.S. 227, 241 (1990) (*Caldwell v. Mississippi,* 472 U.S. 320 (1985)); *Beard v. Banks,* 542 U.S. 406, 417 (2004) (*Mills v. Maryland,* 486 U.S. 367 (1988)); *see also Saffle v. Parks,* 494 U.S. 484, 495 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague's* first exception).

The *Miller* "decision does not categorically bar a penalty for a class of offenders or type of crime. " *Miller,* 132 S. Ct. at 2471. *Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles;

Miller bars only those sentences made mandatory by a sentencing scheme. *Id.* at 2469. Therefore, the first *Teague* exception does not apply.

The second *Teague* exception is limited in scope. *Beard*, 542 U.S. at 417. This exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" or "implicit in the concept of ordered liberty." *Id.*; *Teague*, 489 U.S. at 307 (quotation omitted). "In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright* [ ] and only to this rule." *Beard*, 542 U.S. at 417 (citations omitted). The Court has noted that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Id.*

The Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard*, 542 U.S. at 417.

Craig also contends that this court erred in denying his COA based on waiver. At the outset, we note that Craig's COA was not denied based solely on his waiver of certain claims. Instead, it was denied based on his failure to make the requisite showing of "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nonetheless, the order denying Craig's

COA stated: "To the extent that he has not raised his underlying claims that his defense counsel rendered ineffective assistance and that defense counsel's admission of guilt constituted a guilty plea, he has abandoned those unraised issues." Craig failed to brief these issues in his COA motion; therefore, they were appropriately considered waived.

Craig's motion for reconsideration is DENIED.

STATE OF LOUISIANA	*	NUMBER 48,489 SEC. II
	*	
	*	19TH JUDICIAL
	*	DISTRICT COURT
VERSUS	*	
	*	PARISH OF EAST
	*	BATON ROUGE
HENRY MONTGOMERY	*	STATE OF LOUISIANA

MEMORANDUM ON BEHALF OF DEFENDANT IN OPPOSITION TO STATE'S RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL

(Jan. 22, 2013)

Henry Montgomery moved in July 2012 for a hearing to correct illegal sentence in light of **Miller v. Alabama**.[1] According to Montgomery's motion and court records, in February 1964, a jury convicted Montgomery of the murder of Charles Hurt that occurred on June 28, 1963, just days past Montgomery's seventeenth birthday.[2] Montgomery was granted a new trial in 1969, but was found guilty once more on February 8, 1969. He was not given the death penalty, but sentenced, to mandatory life imprisonment on March 19, 1969.

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[1] 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407. Montgomery moved as a *pro se* defendant. On September 20, 2012, the court appointed the Office of Public Defender to represent the defendant.

[2] Montgomery was born June 17, 1946.

The state objected to Montgomery's motion, initially arguing (1) that **Miller** is not retroactive to cases in which direct review is concluded, but if applicable, (2) the court should wait for legislative action or set an evidentiary hearing to weigh the **Miller** criteria in deciding whether Montgomery should or should not have the parole eligibility restriction removed from his sentence.[3] Thereafter, the state filed a supplemental response moving for this court to dismiss Montgomery's motion without a hearing in light of the United States Fifth Circuit ruling in **Craig v. Cain**, which held that **Miller** does not apply retroactively to cases on collateral review.[4]

Montgomery, through appointed counsel, now contends that **Miller** is retroactive based upon the most recent Louisiana Supreme Court cases to address the matter.

In **Miller**, the United States Supreme Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Referencing **Graham v. Florida**,[5] the Supreme Court stated that while a state is not required to guarantee eventual freedom, it must provide some meaningful opportunity to

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[3] Original state objection.

[4] 2013 WL 69128 (5th Cir. 2013).

[5] 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

obtain release based on demonstrated maturity and rehabilitation.[6] Thus under **Miller**, a juvenile cannot be sentenced to life imprisonment without an opportunity for parole because

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eight [sic] Amendment's ban on cruel and unusual punishment.[7]

The opportunity to argue for a sentence less than life is available to Montgomery notwithstanding his five-decade old conviction and the position of the state.

While the United States Fifth Circuit may have recently ruled that **Miller** is not retroactive – thus not applicable in matters of collateral review – the Louisiana Supreme Court in **State v. Simmons**,[8]

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[6] 567 U.S. ___, 132 S.Ct. at 2469.

[7] **Miller**, 567 U.S. ___, 132 S.Ct. at 2475.

[8] 2011-1810 (La. 10/12/12), 99 So.3d 28. See **People v. Morfin**, ___ N.E.2d ___, 2012 IL App (1st) 103568, where an Illinois Appellate court held **Miller** retroactively applicable on collateral review.

implied that **Miller** is retroactive.[9] Simmons is presently serving a sentence of life imprisonment at hard labor without the possibility of parole for a second degree murder committed in 1995 when he was 17 years old. In 2011, he filed a motion to correct illegal sentence, arguing similar to Montgomery, that the sentence of life imprison-ment [sic] without parole for a juvenile offender is no longer constitutionally permissible under developing legal standards.

Because of **Miller**, the Louisiana Supreme Court remanded to the district court to reconsider Simmons's sentence after conducting a sentencing hearing. Subsequent to **Simmons**, the State Supreme Court a [sic] sent a second case back for reconsideration of sentence.

In **State ex rel. Albert Landy v. State of Louisiana**,[10] the defendant was serving a mandatory life sentence for second degree murder and filed a

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[9] For an instructive comparison, the Louisiana Supreme Court applied **Graham v. Florida**, ___ U.S. ___,130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) – which held, that the United States constitution prohibits the imposition of life without parole sentence on a juvenile offender who did not commit homicide – retroactive on collateral review. **State v. Dyer**, 2011-1758 (La. 11/23/11), 77 So.3d 928. The First Circuit applied **Graham** as [sic] least twice in collateral reviews or motions to correct illegal sentence. **State v. Burge**, 2012-0761 (La. App. 1 Cir. 12/21/12), **State v. Walder**, 2012-0051 (La. App. 1 Cir. 9/24/12).

[10] 2011-0796 (La. 1/18/13), ___ So.3d ___.

motion to correct an illegal sentence after **Graham** was decided. While his case was pending. **Miller** was rendered. The Court, as it did in **Simmons**, remanded the case for reconsideration after a new sentencing hearing.

Additionally, the Louisiana Fourth Circuit, in **State v. Williams**,[11] held that in light of **Simmons**, "**Miller** is retroactive to cases that were final in Louisiana at the time the decision in **Miller** was rendered "

Thus, according to the Louisiana Supreme Court and at least one appellate court, **Miller** is retroactive to cases on collateral review within the state. And because **Simmons** and **Landry** are the last expressions of law on this matter within the state, the district court is required to follow it. **Pelican State Associates, Inc. v. Winder**.[12]

In light of these precepts, the state's position that Montgomery's motion should be denied without a hearing is not supported by the law. This court should therefore conduct a hearing to determine if

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[11] 2012-1604 (La. App. 4 Cr. 1/7/13), ___ So.3d ___.

[12] 253 La. 697, 219 So.2d 500 (1969); **Oliver v. Magnolia Clinic**, 2011-2132 (La. 3/13/12).

Montgomery is entitled to have his sentence modified in accordance with **Miller**.

Respectfully submitted:

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[Certificate Of Service Omitted]

01/18/2013 "See News Release 003 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 2011-KH-0796

STATE EX REL. ALBERT LANDRY

VERSUS

STATE OF LOUISIANA

ON SUPERVISORY WRIT FROM THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

PER CURIAM.

Writ granted. Relator is presently serving a sentence of life imprisonment without possibility of parole for a second degree murder committed in 1976

when he was 17 years old. The sentence was mandated by the penalty provision of the statute establishing the offense. R.S. 14:30.1. In 2011, relator filed a motion to correct an illegal sentence in which he contended that a sentence of life imprisonment without parole for a juvenile offender is no longer constitutionally permissible under developing legal standards, and in particular in light of *Graham v. Florida,* 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Eighth Amendment precludes sentencing juvenile offenders to life imprisonment without parole for non-homicide crimes). The district court (Johnson, J) denied relief. While review of that judgment was pending, the United States Supreme Court determined that mandatary life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments" *Miller v. Alabama,* No. 10-9646 slip op., 567 U.S. ___, 130 S.Ct. 2011, ___, 176 L.Ed.2d 825 (June 25, 2012). Unlike the case in *Graham,* the *Miller* court did not establish a categorical prohibition against life without parole for juveniles but instead required that a sentencing court consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the harshest possibly [sic] penalty for juveniles. Therefore, we grant to remand to the district court to reconsider the sentence after conducting a new sentencing hearing in accordance with the principles enunciated in *Miller v. Alabama*.

STATE OF LOUISIANA	*	NUMBER 48,489 SEC. II
	*	19th JUDICIAL
	*	DISTRICT COURT
VERSUS	*	
	*	PARISH OF EAST
	*	BATON ROUGE
HENRY MONTGOMERY	*	STATE OF LOUISIANA

MOTION AND NOTICE OF WRIT APPLICATION

On motion of defendant, alleging that he is aggrieved by the court's ruling of January 30, 2013; that he intends to immediately file a writ application to the First Circuit Court of Appeal and if necessary to the Louisiana Supreme Court; and that this court must set a time period in which that application must be filed.

IT IS ORDERED that defendant, Henry Montgomery, file his writ application by the 27th day of March, 2013 by 9:00 o'clock, a.m.

Baton Rouge, Louisiana, this 27 day of February, 2013.

/s/ Richard Anderson

JUDGE, 19TH JUDICIAL DISTRICT COURT

Submitted by:

/s/ Sean Collins

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[Certificate Of Service Omitted]

APPLICATION FOR SUPERVISORY WRIT OF REVIEW

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

Number: _____

STATE OF LOUISIANA
Respondent

versus

HENRY MONTGOMERY
Relator

ORIGINAL CRIMINAL WRIT APPLICATION OF HENRY MONTGOMERY

(Mar. 20, 2013)

TO THE RULING OF THE NINETEENTH JUDICIAL DISTRICT COURT
Number: 48-489 Section: II
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A. Montgomery's Motion to Correct Illegal Sentence

B. Motion for Procedural Default

C. Motion for Summary Judgment

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E. Montgomery's Traversal of State's Answer

F. Montgomery Memorandum In Opposition

G. State's Supplemental Response

H. Court Ruling

I. Motion and Notice of Writ Application

[1] I. ISSUE AND ASSIGNMENT OF ERROR

Mandatory life imprisonment without parole for those under 18 violates the Eighth Amendment's prohibition on cruel and unusual punishment. Because Henry Montgomery was under the age of 18 at the time he was convicted of murder, he is entitled to a hearing for the court to consider whether mitigating circumstances should result in an altered sentence. The trial court erred in denying Montgomery's motion based on retroactivity, particularly in light of a Louisiana Supreme Court decision that holds **Miller v. Alabama**[1] retroactive.

II. STATEMENT OF JURISDICTION

Montgomery seeks the supervisory jurisdiction of this court to reverse a trial court ruling that denied his motion for a hearing to correct an illegal sentence.

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[1] 567 U.S. ___, 132 S.Ct. 2455, 83 L.Ed.2d 407.

This court has supervisory jurisdiction over the Nineteenth Judicial District Court.[2]

III. STATEMENT OF THE CASE

Montgomery moved in July 2012 for a hearing to correct illegal sentence in light of **Miller**.[3] Montgomery's motion and court records show that in February 1964 a jury convicted Montgomery for the murder of Charles Hurt on June 28, 1963, just days after Montgomery turned seventeen.[4] Montgomery was granted a new trial in 1969 and was found guilty once more on February 8, 1969. He was sentenced to mandatory life imprisonment.

The state objected to Montgomery's motion, initially arguing (1) that **Miller** is not retroactive to cases in which direct review is concluded; (2) but if applicable, the court should wait for legislative action or set an evidentiary hearing to weigh the [2] **Miller** criteria in deciding whether Montgomery should or should not have the parole eligibility restriction removed from his sentence.[5] Thereafter, the state filed a supplemental response that moved for the trial court to dismiss Montgomery's motion without a hearing in light of the United States Fifth Circuit

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[2] Louisiana Constitution Article 5, Section 10.

[3] Appendix A.

[4] Montgomery was born June 17, 1946.

[5] Original state objection, Appendix D.

ruling in **Craig v. Cain**, which held that Miller does not apply retroactively to cases on collateral review.[6]

IV. TRIAL COURT ACTION

The trial court agreed with the state, denying Montgomery's motion. The trial court adopted **Craig**, ruling that Montgomery did not overcome the general bar to retroactivity.[7] This writ application follows.[8]

V. MEMORANDUM ADDRESSING SPECIFICATION OF ERRORS

*The trial court erred in holding **Miller** is not retroactive.*

The trial court erred in denying Montgomery's motion for a hearing. **Miller** is retroactive based upon the latest Louisiana Supreme Court case, the right of a state to apply a constitutional ruling retroactive, and **Miller** which applied its ruling to a juvenile defendant on collateral review.

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[6] 2013 WL 69128 (5th Cir. 2013); State supplemental response, Appendix G.

[7] Appendix H.

[8] Appendix I. While Rule 4-3, Uniform Rules – Courts of Appeal sets a 30-day return date from the date of ruling in criminal matters (unless the court orders a written judgment), a signed motion setting a day beyond the 30-day deadline is treated as a motion for extension of time. **Barnard v. Barnard**, 1996-0859 (La. 6/24/96), 675 so 2d 734.

In **Miller**, the United States Supreme Court held that mandatory, life imprisonment without parole for those under the age of 18 at the time of their crimes (of homicide) violates the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishment. Relying upon **Graham v. Florida**,[9] the court held that while a state is not required to guarantee eventual freedom, it must provide some [3] meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[10]

Thus, under **Miller**, a juvenile cannot be sentenced to life imprisonment without an opportunity for parole because

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eight [sic] Amendment's ban on cruel and unusual punishment.[11]

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[9] 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

[10] 567 U.S. ___, 132 S.Ct. at 2469.

[11] **Miller**, 567 U.S. ___, 132. S.Ct. at 2475.

Montgomery is entitled to argue for a sentence less than life notwithstanding his five-decade old conviction.

While the United States Fifth Circuit recently rule [sic] that **Miller** is not retroactive – thus inapplicable in matters of collateral review – the Louisiana Supreme Court in **State v. Landry**,[12] decided after **Craig**, held otherwise. In **Landry**, the defendant was serving a mandatory life sentence for second degree murder committed in 1976 when he was 17 years old. In 2011 Landry filed a motion to correct an illegal sentence which was denied. Ultimately, the Louisiana Supreme Court granted Landry's writ application, remanding the case to the district court "to reconsider the sentence after conducting a new sentence hearing" in accordance with **Miller**.[13]

In **State v. Simmons**,[14] the defendant was given a sentence of life imprisonment at hard labor without the possibility of parole for a second degree murder committed in 1995 when he was 17 years old. In 2001, he filed a motion to correct illegal [4] sentence, arguing similar to Montgomery that the sentence of life imprisonment without parole for a juvenile offer [sic] is no longer constitutionally permissible under developing legal standards. In light of **Miller**, the

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[12] 2011-0796 (La. 1/18/13), 106 So.3d 106

[13] 2011-0796, p. 2; 106 So.3d at 107.

[14] 2011-1810 (La. 10/12/12), 99 So.3d 28.

Louisiana Supreme Court remanded to the district court to reconsider Simmons's sentence.

Therefore, for at least three reasons the trial court erred: (1) the Louisiana Supreme Court held that **Miller** is retroactive, ruling so two weeks *after* **Craig**.[15] The trial court must follow **Landry**, not **Craig**, since it is the latest expression of law on this matter within the state. **Pelican State Associates, Inc. v. Winder**;[16] (2) although the federal court in **Craig** held that **Miller** is not retroactive – specifically in a federal habeas proceeding – no rule of law prohibits the Louisiana Supreme Court from applying the ruling retroactively. In **Danforth v. Minnesota**,[17] the United States Supreme Court held that **Teague v. Lane**[18] under which courts analyze whether a new constitutional rule is retroactive, does not constrain a state court to give broader effect to new rules of criminal procedure that is required by that opinion;[19] and (3) a close reading of **Miller** demonstrates that the United States Supreme Court applied the decision retroactively. **Miller** consolidated two cases, one

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[15] It is no stretch to contend that the Louisiana Supreme Court knew of **Craig** when it ruled in **Landry**.

[16] 253 La. 697, 219 So.2d 500 (1969); **Oliver v. Magnolia Clinic**, 2011-2132 (La. 3/13/12), 85 So.3d 29.

[17] 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

[18] 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[19] The **Landry** opinion infers the Louisiana Supreme Court was aware of the **Teague** analysis, but decided nonetheless that **Miller** applied retroactively. *See* J. Clark, disssent [sic].

involving juvenile Kuntrell Jackson whose writ of certiorari emanated after he exhausted state court habeas proceedings. In ruling **Miller** applied to juveniles, the Supreme Court remanded [5] Jackson's case for the state court to apply the new ruling.[20]

Finally, this court should note that the Louisiana Supreme Court and this court have in similar instances applied United States Supreme Court rulings retroactive. *See* **State v. Dyer**,[21] which applied **Graham v. Florida**[22] (the United States constitution prohibits the imposition of a life without parole sentence for a juvenile who did not commit homicide) retroactive on collateral review. At least twice, this court did the same. *See* **State v. Burge**[23] and **State v. Walder**.[24]

VI. CONCLUSION

The trial court erred in denying Montgomery's motion to correct illegal sentence on grounds that **Miller** is not retroactive. This court should grant this

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[20] Accord. **Hill v. Snyder**, 2013 WL 364198, fn. 2 (E.D. Mich, 2013) (Holding that it would find **Miller** retroactive on collateral review, citing **Teague**, "[o]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all those who are similarly situated").

[21] 2011-1758 (La. 11/23/11), 77 So.3d 928.

[22] 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)

[23] 2012-0761 (La. App. 1 Cir. 12/21/12).

[24] 2012-0051 (Ala. App. 1 Cir. 9/24/12).

writ, reverse the trial court, and remand the matter for a hearing in conformity with **Miller**.

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[VII. Verification And Affidavit Of Service Omitted]

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

DOCKET NUMBER: 2013-KW-0442

(Apr. 2, 2013)

****

STATE OF LOUISIANA, RESPONDENT

VERSUS

HENRY MONTGOMERY,
DEFENDANT/PETITIONER

****

FROM THE 19TH JUDICIAL DISTRICT COURT

FOR THE PARISH OF
EAST BATON ROUGE, LOUISIANA

DISTRICT COURT DOCKET
NUMBER: 48-489, SEC. II

HONORABLE RICHARD ANDERSON,
JUDGE PRESIDING

****

ORIGINAL OPPOSITION TO CRIMINAL WRIT APPLICATION, FILED ON BEHALF OF THE STATE, PETITIONER CRIMINAL PROCEEDING

****

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Exhibits attached to writ opposition:

Exhibit A – Trial Court Order from 19th JDC denying Miller Retroactivity 18

Exhibit B – Trial Court Order from 4th JDC denying Miller Retroactivity 19

Exhibit C – Writ Grant for the State from the Third Circuit staying proceedings below where the Trial Court found Miller Retroactive 20

[1] I. STATEMENT OF JURISDICTION AND STANDING

Jurisdiction vests under the Louisiana Constitution, Article 5, Section 10(a), which provides that a "court of appeal has appellate jurisdiction of all criminal cases triable by a jury." A court of appeal "has supervisory jurisdiction over cases which arise within its circuit." La. Const. art. V. § 10(a). For the reasons stated below, this Honorable Court should not exercise its jurisdiction in this matter.

The Attorney General's Office has standing to file this brief and represent the State in this case, along with the 19th Judicial District Attorney's Office. In

this case, the Trial Court found that Montgomery's sentence was not affected by *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).[1] Montgomery's argument, that *Miller v. Alabama* is retroactive on collateral review, necessarily requires that a particular statute be found unconstitutional, namely La. R.S. 14:30 (Murder),[2] as it is applied to all murderers who were not yet 18 at the time of their crimes by virtue of the 8th Amendment to the United States Constitution. The Office of the Louisiana Attorney General has a discretionary right to respond to such a challenge and represent the State with respect to that challenge. *See* La. R.S. 13:4448;[3] La. C.C.P. art. 1880;[4] La. R.S.49:257(C);[5] *See also* La.

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[1] Montgomery's Original Criminal Writ Application, Exhibit H, (Mar. 22, 2013).

[2] *See State v. Montgomery*, 257 La. 461, 463, 242 So.2d 818, 818 (1970).

[3] "Prior to adjudicating the constitutionality of a statute of the state of Louisiana, the courts of appeal and the Supreme Court of Louisiana shall notify the attorney general of the proceeding and afford him an opportunity to be heard. The notice shall be made by certified mail. No judgment shall be rendered without compliance with the provisions of this Section; provided where the attorney general was not notified of the proceeding, the court shall hold adjudication of the case open pending notification of the attorney general as required herein."

[4] "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In a proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard. If the statute, ordinance, or franchise is

(Continued on following page)

C.Cr.P. art. 63. [2] The Attorney General's Office has chosen to respond to this motion and represent the State in this matter, along with the 19th Judicial District Attorney's Office.

II. STATEMENT OF THE CASE

On November 18, 1963, Henry Montgomery was indicted for the murder of Charles H. Hurt, a Deputy Sheriff for the Parish of East Baton Rouge. *See* La. R.S. 14:30. Montgomery was subsequently convicted of that crime. Montgomery's conviction became final on direct review on December 14, 1970. *Montgomery,* 242 So.2d at 818;[6] La. C.Cr.P. art. 922(C). All litigation in this case since then has been pursuant to collateral post conviction review. Montgomery filed a *pro se* motion to correct illegal sentence on July 25, 2012. After subsequent motions by the defense and an opposition filed by the State, Montgomery's motion

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alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

[5] "Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed."

[6] The State concedes that Montgomery was younger than 18 at the time of the crime, *See State v. Montgomery,* 248 La.713, 716, 181 So.2d 756, 757 (1966).

was denied by Judge Richard Anderson on January 30, 2013.[7]

III. ISSUE PRESENTED

Is *Miller v. Alabama* retroactive on collateral review pursuant to *State ex rel. Taylor v. Whitley,* 606 So.2d 1292 (La. 1992), which adopted the federal standard enunciated in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)? The Trial Court correctly found that *Miller* is not retroactive on collateral review.

[3] IV. ARGUMENT

When a case is presented on collateral review in Louisiana, as it is here, this Court must apply the *Teague* standard. *State ex rel. Taylor v. Whitley,* 606 So.2d 1292, 1296 (La. 1992). In order to determine retroactivity under *Teague v. Lane,* 489 U.S. 288, 292, 109 S.Ct. 1060, 1065, 103 L. Ed. 2d 334 (1989), this Court must apply a three-step process:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. **First,** the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. **Second,** the court must '[s]urve[y] the legal

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[7] Montgomery's Original Criminal Writ Application, Exhibit H, (Mar. 22, 2013).

> landscape as it then existed' and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt **compelled** by existing precedent to conclude that the rule [he] seeks was required by the Constitution'
>
> **Finally**, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle

Caspari v. Bohlen, 510 U.S. 383, 390, 114 S.Ct. 948, 953, 127 L. Ed. 2d 236 (1994) (emphasis added) (citations omitted).

It is undisputed that Montgomery is proceeding by collateral review, as opposed to direct, appellate review. A state court considering Montgomery's claim at the time his conviction became final would surely have rejected his Eighth Amendment claim.[8] This step is necessary because new rules of constitutional law apply "to all similar cases pending on direct review." *Griffith v. Kentucky,* 479 U.S. 314, 322-23, 107 S. Ct. 708, 713, 93 L. Ed. 2d 649 (1987); *See also State ex rel. Taylor v. Whitley,* 606 So.2d 1292, 1296 (La.

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[8] *See e.g. State v. Craig,* 2005-2323 (La. App. 1st Cir. 10/25/06), 944 So.2d 660, 662-65; *State v. Ross,* 2003-0564 (La. App. 3rd Cir. 12/17/03), 861 So.2d 888, 896-98; *State v. Jacobs,* 2007-887 (La. App. 5th Cir. 05/24/11), 67 So.3d 535, 594-95; *State v. Crotwell,* 2000-2551 (La. App. 1st Cir. 11/9/01), 818 So.2d 34, 45; *State v. Pilcher,* 27,085 (La. App. 2nd Cir. 05/10/95), 655 So.2d 636, 641-44.

1992) ("Subsequently, our cases have followed *Griffith v. Kentucky, supra,* and have applied new rules to cases pending on direct review or not yet final.") (Citations omitted). Since Montgomery [4] is proceeding on collateral review, the State may raise the *Teague* defense, as *Griffith* does not apply to him.

There is no question that *Miller v. Alabama* created a new rule of constitutional law. The Court's majority counted 29 jurisdictions that "make a life-without-parole term mandatory for some juveniles convicted of murder in adult court." 132 S.Ct. at 2471.[9] *Miller* also overruled, in part, the holding of *Harmelin v. Michigan,* which held that "death is different" and non-capital sentences do not require application of the Court's 'individualized sentencing' capital jurisprudence. 501 U.S. 957, 994, 111 S.Ct. 2680, 2701, 115 L. Ed. 2d 836 (1991); *Miller,* 132 S.Ct. at 2470.[10]

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[9] *Miller* constitutionally limited numerous state statutes, including the one under which the defendant was sentenced. Westlaw lists Louisiana's first degree murder statute as constitutionally limited: "LSA-R.S. 14:30(C) . . " *Id.* at 2455 (West, 2012).

[10] The State concedes that whether one uses the term "overrules" depends, in part, on one's point of view. The Court in *Miller* explicitly found "Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*." *Id.* at 2470. However, the term "overruled in part" is proper because Courts have traditionally applied *Harmelin* to juvenile defendants, as well as adult defendants. *See e.g. Filcher,* 655 So.2d at 637-44 (specifically applying *Harmelin* to a life sentence for murder involving a fifteen year old defendant).

Further, the Court's majority in *Miller* found that its decision in *Graham v. Florida*[11] did not **compel** a similar outcome in *Miller*:

> *Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, ***Graham*'s flat ban on life without parole applied only to nonhomicide crimes**, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm.

Miller, 132 S.Ct. at 2465 (citing *Graham*, 130 S.Ct. at 2027) (emphasis added).

The dissent in *Miller* made a pointed observation:

> [5] In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual, it instead claims that precedent **"leads to"** today's decision, primarily relying on *Graham* and *Roper* Petitioners argue that the reasoning of those cases "compels" finding in their favor. The Court is apparently unwilling to go so far, asserting only that precedent

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[11] *Graham* held: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 2034, 176 L.Ed.2d 825 (2010).

> points in that direction. But today's decision invalidates the laws of dozens of legislatures and Congress. This Court is not easily led to such a result If the Court is unwilling to say that precedent **compels** today's decision, perhaps it should reconsider that decision.

Id. at 2480 (Roberts, C.J., dissenting) (emphasis added).

The Federal Fifth Circuit recently found that *Graham* was a new rule of constitutional law for the purposes of *Teague*. *In re Sparks,* 657 F.3d 258, 260 (5th Cir. 2011). Like *Graham, Miller* clearly states a new rule of constitutional law that was not previously available: *Miller* was certainly the first recognition that the Eighth Amendment bars the imposition of life imprisonment without parole on homicide offenders under age eighteen who have not been afforded an opportunity to present mitigating evidence, *See Id.*; *See also Miller,* 132 S.Ct. at 2466, n.6, 2474-75. *Miller* is clear that all the Eighth Amendment requires with respect to a juvenile who is convicted of a homicide is a discretionary sentencing regime and that regime may allow for the *possibility* of a sentence of life without parole. *Id.*[12] Since (1) Montgomery is seeking

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[12] The following passages are from the majority in *Miller*: "But contrary to the dissents' charge, our decision today retains that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility

(Continued on following page)

collateral relief, where (2) Courts have not heretofore allowed relief under similar circumstances, and (3) because *Miller* is a [6] new rule, Montgomery must show that he qualifies for one of the two exceptions under *Teague.*[13]

The Watershed Exception

On January 4, 2013, the Federal Fifth Circuit issued a judgment in *Dale Dwayne Craig v. Burl Cain,* a Louisiana **state** case on federal habeas corpus review.[14] The Court in *Craig* found *Miller* to be ***not***

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of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate.

Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller,* 132 S.Ct. at 2466, n.6, 2474-75.

[13] "The first exception is for new rules that place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' . . . The second exception is for "watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.' . . . " *Bohlen,* 510 U.S. at 396, 114 S.Ct. at 956 (citations omitted).

[14] The undersigned is lead counsel for the State in *Craig v. Cain.* Dale Dwayne Craig was convicted in the 19th Judicial District Court of First Degree Murder in 1994 and was sentenced to death. *See State v. Craig,* 1995-2499 (La. 05/20/97), 699 So.2d 865, 868.

retroactive under either exception. The Court stated the following with respect to the watershed exception:

> The second *Teague* exception is limited in scope. [*Beard v. Banks*, 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004)]. This exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" or "implicit in the concept of ordered liberty." *Id.*; *Teague*, 489 U.S. at 307 (quotation omitted). "In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright* [ ] and only to this rule." *Beard*, 542 U.S. at 417 (citations omitted). The Court has noted that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Id.*
>
> The Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard*, 542 U.S. at 417.

Craig v. Cain, 2013 WL 69128 (5th Cir. 2013), *unpublished, motion to vacate denied.*

The "watershed" exception is clearly inapplicable here because *Miller* has nothing do to with the **innocence or guilt** of the defendant. The **United States**

Supreme Court held: "As the plurality cautioned in *Teague*, '[b]ecause we operate from the premise that such procedures would be so central to an accurate [7] determination of **innocence or guilt**, we believe it unlikely that many such components of basic due process have yet to emerge.'" *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 903, 122 L. Ed. 2d 260 (1993) (citing *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077) (emphasis added).[15] Since *Miller* involves a **sentencing** issue *Miller* has **no effect** with respect to whether the defendant obtains an accurate determination of innocence or guilt. The United States Supreme Court has **never** found the *Teague* watershed exception applicable. Not once.[16]

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[15] *But see People v. Williams*, 2012 WL 6206407, 14 (Ill. App. 12/12/12); *People v. Davis*, 2012 WL 6863262 (Ill. App, 12/28/12); *People v. Cooks*, 2013 WL 1195435 (Ill. App. 03/22/13). Interestingly, the intermediate courts of appeal of Illinois have not found a consistent reason for finding *Miller v. Alabama* retroactive. While *Williams*, *Davis*, and *Cooks* found *Miller* retroactive pursuant to both the watershed exception and the primary conduct exception, another division of the Illinois Court of Appeals found *Miller* retroactive only under the primary conduct exception. *People v. Morfin*, 2012 WL 6028634, (Ill. App. 11/30/12). The Illinois Supreme Court has yet to rule on this issue.

[16] "Indeed, since 1989, beginning with the rule at issue in *Teague*, the [United States Supreme] Court has measured numerous new rules, or proposed new rules, of criminal procedure against the criteria for the second [watershed] exception and, in every case, has refused to apply the rule at issue retroactively on habeas review." Brian R. Means, *Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation*, 464 (West 2012).

In *People v. Carp,* an intermediate court of appeals in Michigan also found that the watershed exception did not apply for the same reason:

> To qualify as a "watershed rule" the Court asserted that "a new rule must meet two requirements. First the rule must be necessary to prevent an impermissibly large risk of an **inaccurate conviction**. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[FN98]
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> [FN98] [*Wharton v. Bockting,* 549 U.S. 406, 418, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007)] (citations and quotation marks omitted).

> The *Miller* ruling fails to satisfy the initial requirement pertaining to an "impermissibly large risk of an inaccurate conviction. *Miller* deals exclusively with sentencing and does not pertain to criminal trial procedures leading to conviction. *Miller* is focused solely on accuracy in sentencing and does not address or impinge on the accuracy of a juvenile defendant's conviction for a homicide offense. Addressing the second criteria that a "watershed" rule "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," the decision in *Miller* is not comparable to the rule the Court announced in *Gideon.* The *Miller* ruling has a more restrictive scope of application and does not relate to the accuracy of

> the fact-finding process. Further, this second requirement to [8] establish a "watershed rule" "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right."

Carp, ___ N.W.2d ___, 2012 WL 5846553, 21 (Mich. App. 11/15/12) (Emphasis added) (Footnotes omitted).

The Primary Conduct Exception

Miller is not retroactive on collateral review pursuant to the primary conduct exception either. In short, there is a difference between the **kind** of penalty imposed and the **manner** in which that penalty is imposed:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See [*Bousley v. United States,* 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)] (rule "hold[s] that a statute does not reach certain conduct" or "make[s] conduct criminal"); [*Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990)] (rule "decriminalize[s] a class of conduct **[or] prohibit[s] the imposition of . . . punishment on a particular class of persons"). In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural**. See *Bousley, supra,* at 620, 118 S.Ct. 1604.

Schriro v. Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (bold emphasis added) (italicized emphasis in original).

Schriro completely forecloses discussion with respect to this exception because *Miller* merely determines the **manner** in which a life sentence may be imposed on a juvenile, and does not prohibit a **kind** of punishment. The fact that a kind of punishment was not prohibited was evident in the *Miller* opinion. The majority in *Miller* does not **categorically** prohibit life without parole for juvenile offenders who commit a homicide:

> **Our decision does not categorically bar a penalty for a class of offenders or type of crime** – as, for example, we did in *Roper* or *Graham.* **Instead, it mandates only that a sentencer follow a certain process** considering an offender's youth and attendant characteristics – before imposing a particular penalty.
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> [9] *Miller,* 132 S.Ct. at 2471 (emphasis added).[17]

In *Craig v. Cain,* the Federal Fifth Circuit found *Miller* to be ***not*** retroactive under the primary conduct exception:

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[17] *See also Conley v. State,* ___ N.E.2d ___, 2012 WL 3570390, 1-10 (Ind. 2012) (The Indiana Supreme Court found, under *Miller v. Alabama,* juvenile life without parole was permissible for a seventeen-and-a-half-year-old who murdered his ten-year-old brother: "Our holding that the life without parole sentence is not unconstitutional is not altered by *Miller.*")

To overcome the general bar to retroactivity of new rules on collateral review, Craig must meet one of the two *Teague* exceptions. *Teague,* 489 U.S. 307. The first exception extends to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *O'Dell v. Netherland,* 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997). **This exception appears to apply only when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants, not when a rule addresses the considerations for determining a sentence.** For example, we have used *Teague's* first exception in applying prohibitions on the execution of defendants who are mentally handicapped or juveniles, and sentences of life imprisonment without parole for juveniles convicted of nonhomicide offenses. *Bell v. Cockrell,* 310 F.3d 330, 332 (5th Cir.2002) (retroactively applying *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)); *In re Sparks,* 657 F.3d 258, 262 (5th Cir.2011) (citing *Arroyo v. Dretke,* 362 F.Supp.2d 859, 883 (W.D.Tex.2005)) (*Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)); *Sparks,* 657 F.3d at 262 *(Graham v.* [*Florida*], ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)).

By contrast, the Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances

in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v. Singletary,* 520 U.S. 518, 539, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (foreclosing retroactive application of *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)); *Sawyer v. Smith,* [497] U.S. 227, 241 (1990) (*Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *Beard v. Banks,* 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (*Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)); *see also Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague's* first exception).

The *Miller* "decision does not categorically bar a penalty for a class of offenders or type of crime. " *Miller,* 132 S.Ct. at 2471. ***Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those** [10] **sentences made mandatory by a sentencing scheme.** *Id.* at 2469. Therefore, the first *Teague* exception does not apply.

Craig, 2013 WL 69128, 1-2; *Compare In re Sparks,* 657 F.3d 258 (5th Cir. 2011) (By contrast, the

Fifth Circuit explained that *Graham v. Florida* was retroactive on collateral review under the primary conduct exception because **all** juveniles convicted of non-homicide offenses cannot be given a life sentence without meaningful opportunity for release).[18] This key difference between *Graham* and *Miller* shows that *Graham* does not dictate the outcome in this case.

With respect to the Primary Conduct Exception, the Michigan Court of Appeals in *Carp* stated in part:

> Our determination that *Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review, is supported by the fact that the ruling does not place "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." *Miller* does not alter the elements necessary for a homicide conviction. Rather it simply necessitates the consideration of certain factors, when juveniles are involved, in sentencing. In other words, *Miller* is not substantive as it does not serve to "alter [ ] the range of conduct or class of persons that the law

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[18] The opposing position has the support of the intermediate courts of appeals in Illinois and the Eastern District of Michigan, *See e.g. Morfin*, 2012 WL 6028634; *Hill v. Snyder*, 2011 WL 364198 (E.D. Mich. Jan. 30, 2013). It is worth mentioning that *Hill* did not decide the issue of retroactivity on collateral review as that issue was not before the Court. *Id.* at 2.

> punishes,"[FN119] **merely the manner in which a punishment may be imposed.** Juveniles can still be subject to a sentence of life in prison without parole. It is simply the manner and factors to be considered in the imposition of that particular sentence that *Miller* dictates, rendering the ruling procedural and not substantive in nature.
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> [FN 119] *Schriro,* 542 U.S. at 353.

Carp, 2012 WL 5846553, 20 (footnote omitted) (emphasis added).

In short, since it is not "beyond the power of the criminal lawmaking authority to proscribe" life without parole for a juvenile who commits a homicide, "it necessarily follows that this Court has [not] 'made' that new rule retroactive to cases on collateral review [under the primary conduct exception]." *See Sparks,* 657 [11] F.3d at 262 (citing *Tyler v. Cain,* 533 U.S. 656, 669, 121 S.Ct. 2478, 2486, 150 L.Ed.2d 632 (2001), (O'Connor, J., concurring).

The Court in *Miller* derived its holding from two separate lines of cases: 'categorical ban' cases, such as *Graham* and *Roper,* but also from its 'individualized sentencing' cases, such as *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Miller,* 132 S.Ct. at 2463-68. While *Sumner, Eddings,* and *Lockett* were decided prior to *Teague,* more recent 'individualized

sentencing' cases decided after *Teague* were not found to be retroactive. *See e.g. Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Cordova v. Collins,* 953 F.2d 167 (5th Cir. 1992); *Wilcher v. Hargett,* 978 F.2d 872 (5th Cir. 1992); *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993); *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L. Ed. 2d 442 (2004).

These last two cases, *Graham v. Collins* and *Schriro,* deserve further discussion. In *Graham v. Collins,* the United States Supreme Court decided the following issue:

> In this case, we are asked to decide whether the jury that sentenced petitioner, Gary Graham, to death was able to give effect, consistent with the Eighth and Fourteenth Amendments, **to mitigating evidence of Graham's youth, family background, and positive character traits**. Because this case comes to us on collateral review, however, we must first decide whether the relief that petitioner seeks would require announcement of a new rule of constitutional law, in contravention of the principles set forth in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Concluding that Graham's claim is barred by *Teague,* we affirm.

> Plainly, [the primary conduct] exception has no application here because the rule Graham seeks "would neither decriminalize a class of

> conduct nor prohibit the imposition of capital punishment on a particular class of persons." [*Saffle*] 494 U.S., at 495, 110 S.Ct., at 1264.

[12] *Graham v. Collins*, 506 U.S. at 463, 477 (emphasis added).

In *Schriro,* the defendant was convicted of first degree murder. 542 U.S. at 350. Under the statutory scheme then in place, whether aggravating factors existed justifying imposition of the death penalty was determined by the judge, not the jury. Subsequently, the United States Supreme Court held such sentencing schemes unconstitutional, requiring, in *Ring v. Arizona,* that the determination of aggravating factors be made by a jury. 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002); *Schriro,* 542 U.S. at 350-51. Though the defendant had received a death sentence under a procedure the Supreme Court had later held unconstitutional in *Ring,* the Supreme Court held that the defendant was not entitled to relief pursuant to *Teague* because, under the primary conduct exception, "rules that regulate only ***the manner of determining*** the defendant's culpability are procedural." 542 U.S. at 353 (citation omitted) (emphasis added).

The Three Arguments made by Montgomery must be Dismissed

Montgomery makes three specific arguments with respect to retroactivity. Montgomery's first and third arguments are interrelated and will be discussed together. Montgomery argues there is controlling

precedent on this issue in Louisiana, citing *State ex rel. Albert Landry,* 201-0796 (La. 01/18/13), 106 So.3d. 106. *See also State v. Simmons,* 2011-1810 (La. 10/12/12), 99 So.3d 28. Montgomery also points out that Kuntrell Jackson's case, *Jackson v. Hobbs,* the companion case in *Miller,* was decided on collateral review. *Miller,* 132 S.Ct. at 2461. Both the United States Supreme Court and the Louisiana Supreme Court certainly would not have made such a complex decision by implication and surely did not intend to do so. Although *Miller* says nothing on this point, there is a reasonable explanation:

> [13] Moreover, because petitioner [the State] has not argued that Stumpf's habeas claims were barred as requiring announcement of a new rule, we do not apply the rule of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to this case.

Bradshaw v. Stumpf, 545 U.S. 175, 182, 125 S.Ct. 2398, 2405, 162 L. Ed. 2d 143 (2005) (citations omitted).

To quote *Teague* itself, Montgomery is not "similarly situated" to Kuntrell Jackson,[19] Emerson Simmons,[20] or Albert Landry[21] because, in those cases, the State *did not assert the* ***Teague*** *defense*, which is

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[19] *Miller,* 132 S.Ct. at 2455; *See also Jackson v. Norris,* ___ S.W.3d. ___, 2011 Ark. 49 (2011).

[20] 2011-1810 (La. 10/12/12), 99 So.3d 28.

[21] 2011-0796 (La. 01/18/13), ___ So.3d ___, 2013 WL 211270.

waivable. 489 U.S. at 300. The State is unaware of ***any*** case under *Teague* that has ever been determined to be retroactive by implication.[22]

The State in these cases did not raise the *Teague* defense. This has significant implications:

> The state bears the burden of asserting the *Teague* defense. Bradshaw v. Stumpf, 545 U.S. 175, 182, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005) (declining to apply *Teague* where state did not raise the argument); Caspari v. Bohlen, 510 U.S. 383, 389, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994) ("a federal court may, but need not, decline to apply *Teague* if the State does not argue it"). But "a court must apply it if it was raised by the State." Goeke v. Branch, 514 U.S. 115, 117, 115 S. Ct. 1275, 131 L. Ed. 2d 152 (1995) (*per curium* [sic]).

Brian R. Means, *Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation,* 445 (West 2012).[23]

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[22] In determining the retroactivity of *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), no effect was given to the fact that *Roper* was decided on collateral review. *Baez Arroyo,* 362 F. Supp. 2d 859, 882-84 (W.D. Tex. 2005); *aff'd sub nom. Arroyo v. Quarterman,* 222 F. App'x 425, 426-27 (5th Cir. 2007).

[23] Montgomery notes, at page 4, n.19, that the Louisiana Supreme Court was "aware" of the *Teague* defense. However, Justice Clark's dissent, which refers to *Teague,* only demonstrates

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Neither the Louisiana Supreme Court nor the United States Supreme Court in *Miller* was bound to apply the *Teague* rule.[24]

[14] Montgomery's other argument, on page 4 of his writ application, is that "no rule of law prohibits the Louisiana Supreme Court from applying the ruling retroactively," citing *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 1042, 169 L.Ed.2d 859 (2008).[25] While that statement is true, it does not

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Justice Clark's preference that the Louisiana Supreme Court raise the *Teague* defense on its own motion, or *sua sponte*.

[24] In other briefs, defendants arguing this issue have also argued that a writ denial has some legal significance. *See e.g. State v. Shon Williams*, 2012-KK-2731 (La. 2012); *State v. Reginald Williams*, 2012-1604 (La. App. 4th Cir. 01/07/13), 2013 WL 84902. However, "[a] writ denial does not make law nor does it constitute precedent." *State ex rel. Matthews v. Henderson*, 292 So.2d 496, 498 (La. 1974) (citation omitted). If non-precedential opinions are to be considered by this Court, then it is also worth mentioning that in *State v. Juave Collins*, Docket Number 03-07-0231, Judge Louis Daniel in the 19th Judicial District Court found *Miller* to not be retroactive pursuant to *Craig v. Cain*. A copy of the ruling is attached as Exhibit A. The Trial Court issued its opinion on February 7, 2013. Additionally, the Louisiana 4th Judicial District Court in *State v. Shaw*, Docket Number 93-F-1081, found *Miller* to not be retroactive pursuant to *Craig v. Cain*. A copy of the ruling is attached as Exhibit B. The Trial Court issued its opinion on April 1, 2013. In yet another case, the State sought review of a Trial Court decision finding *Miller* to be retroactive on collateral review and the State's writs have recently been granted to docket the matter for argument. *See* Exhibit C.

[25] "In sum, the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a

(Continued on following page)

follow that the Louisiana Supreme Court would have given broader rights than those mandated in *Teague* in a case where *Teague* was not even *raised*, much less considered.

Since the Louisiana Supreme Court adopted the *Teague* standard in *State ex rel. Taylor v. Whitley,* it would be absurd to suggest that the Court did not also adopt federal jurisprudence regarding how the defense must be raised or whether a Court may raise the issue on its own motion. 606 So.2d 1292, 1296 (La. 1992). There is no case of which the State is aware that departs from federal jurisprudence in any way with regard to *Teague.* This Court should not cause unnecessary confusion by inventing new State court standards that differ from federal standards, Since there is no suggestion that the *Teague* defense was ever raised in *Simmons, Landry,* or *Jackson* at any level prior to those decisions, and since those Courts did not raise it *sua sponte,* there is no controlling law on the retroactivity [15] issue. *There would be no legal bar for the Trial Judges to raise the* ***Teague*** *defense in these cases* ***sue sponte*** *prior to their resentencing hearings.* Unless the Court applied the *Bradshaw-Teague* waiver doctrine, there would be

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state court, when reviews its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague.*"

no legal bar for the State in that case to raise the *Teague* defense either.[26]

Conclusion

The State is unaware of any case under the *Teague* standard that has ***ever*** been determined to be retroactive by implication. It is not done because it does not comport with the strict legal analysis performed under *Teague* and its progeny. To allow for such a result would create inconsistent results and would determine issues that the parties involved did not fairly present to the courts deciding the case. The only way to determine whether *Miller* is retroactive is to perform a full *Teague* analysis, which was essentially performed by Judge Richard Anderson. The State respectfully requests that this Court deny writs in this matter, as Judge Richard Anderson came to the proper conclusion in this case.

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[26] As an aside, since *Miller* was decided, at least two courts in Florida have found *Miller* to be not retroactive. Although not explicitly based on *Teague*, Florida uses a similar test. *See Geter v. State*, 2012 WL 4448860 (Fla., Dist. Ct. App. 2012); *Gonzalez v. State*, 2012 WL 5233454 (Fla., Dist. Ct. App. 2012); *See also Hughes v. State*, 901 So.2d 837, 847 (Fla. 2005) ("While the standards of *Teague* are different from those of *Witt* [which controls Florida cases], they are based on many of the same concerns.") (Citations omitted).

V. PRAYER

In sum, the State of Louisiana asks that the Court to [sic] deny writs in this case. Additionally, the State prays for any and all other relief to which it is entitled.

/s/ Colin Clark
COLIN CLARK

[AFFIDAVIT, VERIFICATION, AND CERTIFICATE OF SERVICE OMITTED]

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STATE'S EXHIBIT A

STATE OF LOUISIANA	NO. 03-07-0231 SEC. V
	19TH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF EAST BATON ROUGE
JUAVE COLLINS	STATE OF LOUISIANA

ORDER

Having this day considered the "motion to vacate illegal and unconstitutional sentence pursuant to new rule of law," filed July 13, 2012, it is DENIED. Defendant was convicted of second degree murder on February 12, 2009, and was sentenced to life imprisonment on February 19, 2009. *Miller v. Alabama,* 132 S. Ct. 2455 (2012), was decided in June of 2012. The

Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." However, the new rule in Miller does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles. *Miller* bars only those sentences made mandatory by a sentencing scheme. Nor does the holding in *Miller* qualify as a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." See *Craig v. Cain*, 2013 WL 69128 (C.A.5(La.)).

Read and signed this 7th day of February, 2013 in Baton Rouge, Louisiana.

/s/ Louis R. Daniel
Louis R. Daniel
Judge, 19th Judicial
District Court

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STATE'S EXHIBIT B

STATE OF LOUISIANA * PARISH OF OUACHITA * FOURTH DISTRICT COURT

STATE OF LOUISIANA **FILED:** APR 01 2013

VS. NO. 93-F-1081 **BY:** /s/ [Illegible]

TIMOTHY SHAW **DEPUTY CLERK**

RULING ON MOTION TO CORRECT ILLEGAL SENTENCE

The defendant was convicted of Second Degree Murder on May 13, 1994 and sentenced to life imprisonment without the benefit of parole, probation or suspension of sentence. He was just shy of his 18th birthday at the time of the offense. This conviction has been affirmed and upheld on appeal.

Now Defendant has filed a Motion to Correct Illegal Sentence based upon the United States Supreme Court case of *Miller v. Alabama,* 132 S. Ct. 2455 (2012), which held that mandatory life without parole for those under the age of 18 at the time of their crime violates the 8th Amendment of the US Constitution. Defendant claims his sentence is unconstitutional and asks for the Court to resentence him.

Under *Craig v. Cain*, 2013 WL 69128 (C.A.5. LA 2013), the US Fifth Circuit Court of Appeals found that the *Miller* holding does not satisfy the test for retroactivity because it does not categorically bar all

sentences of life imprisonment for juveniles; only those sentences made mandatory by a sentencing scheme. Further, it does not qualify as a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."

IT IS THEREFORE ORDERED that Defendant's motion is hereby **DENIED**.

SIGNED AND FILED Monroe, Louisiana, this 27 day of March, 2013.

/s/ Carl V. Sharp
JUDGE CARL V. SHARP
CRIMINAL SECTION "2"

Please serve:

Geary Aycock
4th JDC District Attorney's Office

Timothy Shaw
320943 Cyp-4
La. State Penitentiary
Angola, LA 70712

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STATE'S EXHIBIT C

STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

NO: KW 13-00127

Judgment rendered and mailed to all parties or counsel of record on March 21, 2013.

STATE OF LOUISIANA
VERSUS
DARNELL J. HUNTLEY

FILED: 02/08/13

On application of State of Louisiana for Writ of Review in No. 22045 on the docket of the Fifteenth Judicial District Court Parish of Vermilion, Hon. Jules Davis Edwards.

Counsel for:
Michael Harson — State of Louisiana

Laurie A. Hulin
Colin Clark

Counsel for:
Jan Frederick Rowe — Darnell J. Huntley
Kevin Valdez

Lake Charles, Louisiana, on March 21, 2013.

WRIT GRANTED TO DOCKET.

The resentencing proceeding in this case, which is set for Monday, March 25, 2013, is stayed pending further action of this court.

The Relator, the State of Louisiana, is hereby given until April 10, 2013, to file an additional brief limited to the sentencing issue, if desired. The Respondent, Darnell J. Huntley, is hereby given until April 30, 2013, to file an additional opposition brief limited to the sentencing issue, if desired.

This matter will be set for oral argument, which will be set at a later date, and all parties will be notified.

/s/ SRC
SRC

/s/ JDS
JDS

/s/ EAP
EAP

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NUMBER 2013 KW 0442

VERSUS

HENRY MONTGOMERY MAY 20 2013

In Re: Henry Montgomery, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 48-489.

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

WRIT APPLICATION TRANSFERRED to the Louisiana Supreme Court, which has "exclusive supervisory jurisdiction of all criminal writ applications relating to convictions and sentences imposed prior to July 1, 1982." La. Const. art. V, § 5(E).

JEK
JTP
JMM

COURT OF APPEAL,
FIRST CIRCUIT

/s/ Dana S. Hill
DEPUTY CLERK OF COURT
FOR THE COURT